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REDEMPTION OR EXEMPTION?: RACIAL DISCRIMINATION IN JUDICIAL ELECTIONS UNDER THE VOTING RIGHTS ACT

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The following Note was written and prepared for publication prior to the June, 1991 decisions by the United States Supreme Court in Chisom v. Roemer, *59 U.S.L.W. 4696 (U.S. June 20, 1991) and* Houston Lawyers' Association v. Attorney General of Texas, *59 U.S.L.W. (U.S. June 20, 1991). The principal proposition advanced by the author was generally adopted in the Court's rulings, namely, that the relevant provisions of the Voting Rights Act are applicable to state judicial elections. The Note, however, offers a more extensive discussion of the political and theoretical underpinnings of the Voting Rights Act than that contained in the Court's recent opinions.*

The majority's isolated opinion stands as a burning scar on the flesh of the Voting Rights Act.[1]

INTRODUCTION

When the Voting Rights Act of 1965 was passed and then amended in 1982, no record explicitly indicated whether state judges were covered by its provisions.[2] In 1965, the main thrust of the Voting Rights Act ("the Act") and the principal concerns of voting rights activists were the eradication of poll taxes, literacy requirements, and other egregious procedures that disenfranchised millions of African-Americans in the Deep South.[3] Notwithstanding the historic achievements under the Act in the

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1. League of United Latin American Citizens v. Clements, 914 F.2d 620, 652 (5th Cir. 1990) (en banc) (Johnson, J., dissenting) [hereinafter *"LULAC II"*], *rev'g in part* League of United Latin American Citizens v. Clements, 902 F.2d 293 (5th Cir. 1990) [hereinafter *"LULAC I"*]. Judge Johnson's passionate opinion contended that the Fifth Circuit's en banc ruling, dated September 28, 1990, erroneously reversed a previous Fifth Circuit panel ruling dated May 11, 1990, which held that elections of state judges are covered by relevant provisions of the Voting Rights Act of 1965.

2. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, *amended by* Pub. L. No. 97-205, 96 Stat. 134 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)) [hereinafter "the Act" and "1982 amendments"].

3. For example, just prior to the passage of the 1965 Act, only 6.4% of voting-age African-Americans in Mississippi were registered to vote, while in Alabama and Louisiana, the corresponding figures were 19.2% and 31.8% respectively. South Carolina v. Katzenbach, 383 U.S. 301, 313 (1966). In the seven Southern states (Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia) targeted by the Act, the percentage of voting age African-Americans

past quarter century, voting rights activists today contend that a bastion of racial discrimination persists in the nation's elected state judiciaries which remain overwhelmingly white, even in states with significant African-American and Hispanic populations.[4]

Minority voters attribute this exclusion to the discriminatory impact of at-large judicial elections. In at least eight states, minority voters have challenged the legality of at-large judicial elections, contending that such electoral schemes violate the Act.[5] In at-large elections, voters elect more than one candidate for the same type of elective office in a multi-member government body.[6] For example, in an at-large election for a ten-member county board of commissioners, every voter in that county votes for ten candidates and the top ten vote-getters are elected. Likewise, in at-large judicial elections, voters in a given jurisdiction elect all the judges that serve on the bench in that area. Such at-large systems create a possibility that the votes of a racial minority will be cancelled out by a white majority that votes as a bloc. In contrast to the at-large, multi-member district is the single-member district, where voters in smaller, subdivided districts elect just one official to serve on multi-member government bodies.

Over the past decade, minority voters have relied upon the Act to successfully challenge hundreds of multi-member electoral districts for legislative and executive governmental bodies at the state and local levels.[7] Between 1977 and 1987, the substitution of new single-member districts for the multi-member districts appears to have precipitated a huge increase in the number of African-American elected officials from approximately 3,500 to 5,500.[8] Minority voters now seek to invoke the same voting rights principles to abolish multi-member districts for state

registered to vote was only 29.3% in 1965. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 43 (1975). Among whites in the same states, 73.4% were registered. *Id.*

4. *See* Sherman, *Is Mississippi Turning?*, NAT'L L.J., Feb. 20, 1989, 1, 24-25. As of 1986, there were only 727 African-American state judges nationwide, representing under 3% of all state judges. *Id.* at 24. States with larger minority populations do not necessarily have more minority judges. For example, in Georgia, where African-Americans comprise 26.8% of the population, there are only six African-American judges, or 4.4% of the judges on the Superior Courts. *Id.* In Alabama, despite an African-American population that is 25.6% statewide, African-Americans only comprise 3% and 5.5% respectively of the circuit and district courts. *Id.* In Illinois' Cook County, Hispanic residents constitute 9.5% of the county population. Yet, no Hispanic jurist serves on the appellate courts, while only one (or 0.56%) Hispanic judge serves among the 177 circuit court judges. *Id.*

5. For a summary of each of these suits, see Sherman, *supra* note 4, at 24-25.

6. *See infra* notes 20-23 and accompanying text for a more complete explanation of how an at-large electoral district functions and can effectively discriminate against minority voters.

7. *See* Sherman, *supra* note 4.

8. *Id.*

judges and replace them with single-member judicial districts where minority voters can successfully elect their preferred judicial candidates.

The judicial resolution of this entire issue centers on whether elected judges may be considered "representatives" under the amended section 2 of the Act, which guarantees the rights of minority voters to "elect representatives of their choice."[9] The Fifth Circuit, sitting en banc, recently held in *League of United Latin American Citizens v. Clements* ("*LULAC II*") that the nation's 6,681 popularly-elected state judges[10] are exempt from the protections of section 2 of the Act.[11] Holding that judges are not "representatives," the Fifth Circuit not only reversed its own precedent,[12] but directly countered the Sixth Circuit[13] and district courts in several other circuits.[14]

LULAC II thereby shattered an emerging consensus in the federal courts that discriminatory procedures for state judicial elections violate section 2 of the Act. *LULAC II* now creates a split of opinion in the circuit courts of appeal on this important controversy. The United States Supreme Court has agreed to resolve this issue at the urging of the Justice Department, which pressed upon the Court that the Fifth Circuit had "erroneously decided a question of considerable public importance."[15] Without question, the forthcoming decision of the Supreme Court will determine the fate of the growing number of voting rights challenges to the use of at-large electoral districts to elect state judges.

The proposition of this Note is that section 2 of the Act guarantees that all government elections, including those for judges, must be conducted in a manner that does not dilute minority voting strength and thereby prevent minority voters from electing their preferred candidates. This Note does not address whether popular elections for judges are superior to the various appointive methods of judicial selection.[16] The the-

9. Voting Rights Act of 1965, Section 2, Pub. L. No. 89-110, 79 Stat. 437, *amended by* Pub. L. No. 97-205, 96 Stat. 134 (codified as amended at 42 U.S.C. § 1973 (1988)). *See infra* note 58 and accompanying text for complete language of section 2.

10. 28 COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES, Table 4.1, 4.4 (1990). *See infra* notes 261-69 and accompanying text for comparative statistics on elected and appointed judges in the state court systems.

11. *LULAC II*, 914 F.2d 620, 628, 630-31 (5th Cir. 1990).

12. *See* Chisom v. Edwards, 839 F.2d 1056 (5th Cir.), *cert. denied*, 488 U.S. 955 (1988).

13. Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988).

14. Williams v. State Bd. of Elections, 718 F. Supp. 1324, 1326 (N.D. Ill. 1989); Southern Christian Leadership Conference of Alabama v. Siegelman, 714 F. Supp. 511, 514 (M.D. Ala. 1989); Martin v. Allain, 658 F. Supp. 1183, 1200 (S.D. Miss. 1987).

15. Greenhouse, *High Court to Decide Issue on Election of State Judges*, N.Y. Times, Jan. 19, 1991, at 17, col. 1.

16. For a summary of various views on systems for judicial selection—including merit selection, popular election, and gubernatorial and legislative appointment—see: FRIEDMAN, A HISTORY OF AMERICAN LAW 110-11, 323-25, 592-93 (1973); *USC Symposium of Judicial Election, Selection,*

sis advanced is simply that *if* judges are elected, they must be elected in a manner that is not racially discriminatory. Part I will examine how at-large electoral districts can cause unlawful "minority vote dilution," which is the voting rights doctrine at the heart of this controversy. Part II will analyze four issues demonstrating why judges should be considered "representatives" for purposes of the Act. First, the Act is concerned with the fairness of any type of electoral procedure and the rights of the minority voter, not the function of the political office that is on the ballot. Second, whether judges have been defined as "representatives" for other doctrines is irrelevant to the heightened scrutiny required for racial discrimination claims in voting. Third, Congress manifested a sweeping intent under the Act to eradicate all racially discriminatory electoral procedures, including procedures to elect state judges. Fourth, the notion expressed in *LULAC II* that judges are not "representatives" rests on a dated, formalist notion of jurisprudence and the role of the judiciary.

Finally, Part III examines a novel "compromise" position— postulated by the panel ruling in *League of United Latin American Citizens v. Clements* (*"LULAC I"*) and the concurrence to the en banc rehearing in *LULAC II*—that trial judges should be exempt from the coverage of the Act under a "single office-holder exception."[17] The panel ruling and the en banc concurrence conceded that elected *appellate* judges (but not trial judges) are "representatives" that fall under the protective scope of section 2. However, the panel and the concurrence asserted that because trial judges decide cases as individuals, rather than as part of a collegial body, the districts from which they are elected cannot be subdivided into smaller districts that represent only the minority community. This Note will illustrate the severe adverse impact that such an exception would have and why it is not properly applicable to trial judges.

I. BACKGROUND: MINORITY VOTE DILUTION AND VOTING RIGHTS CHALLENGES TO AT-LARGE ELECTORAL SYSTEMS

Challenges under section 2 of the Voting Rights Act to at-large elections for state judges are a recent development. Congress passed the

and Accountability, 61 S. CAL. L. REV. 1555 (1988); *Judicial Selection: What Fits Texas? A National Symposium on Judicial Selection and Tenure*, 40 SW. L.J. 1 (1986); Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 CASE W. RES. 409 (1981); Davidow, *Beyond Merit Selection: Judicial Careers Through Merit Promotion*, 12 TEX. TECH. L. REV. 851 (1981). *See also infra* notes 263-66 and accompanying text for a summary of the different methods of judicial election.

17. *LULAC I*, 902 F.2d 293, 303-08 (5th Cir. 1990), *rev'd*, 914 F.2d 620, 645-51 (5th Cir. 1990) (en banc) (Higginbotham, J., concurring).

1965 Act at the zenith of the Civil Rights Movement to eliminate pervasive discriminatory electoral procedures such as poll taxes, literacy tests, registration requirements, and other impediments to the right to vote.[18] Section 2 of the 1965 Act specifically provided that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."[19] The scope of the Act was sweeping: Congress delegated broad powers to the federal government such as the suspension of any new electoral procedures pending "pre-clearance" by the Attorney General.[20]

Although there is no explicit reference to at-large districts in section 2, the Act proscribes procedures if they tend to "deny or abridge" the votes of minority voters. In an at-large, or multi-member, district, the electorate in that single district elects multiple officials to serve in similar government posts as part of the same multi-member government body. For example, voters in a city would select more than one (if not all) of their city council members in a city-wide election, more than one (or all) of their county commissioners in a county-wide election, or more than one judge to serve on the bench in their judicial district. Under such electoral systems, it is possible that a minority group would be precluded from electing *any* of its preferred candidates. Minority voters could be effectively disenfranchised by white racial bloc voting, even where the minority group constitutes a larger percentage of the population than the elected at-large officials would each represent if they were elected by proportionate single-member districts.[21] In other words, *a white majority that tends to vote as a bloc in an at-large district can effectively cancel out the ballots of minority voters.* The result is minority vote dilution, which causes consistent defeat for those candidates usually preferred by the minority voters.[22]

18. *See* South Carolina v. Katzenbach, 383 U.S. 301, 309-15 (1966). *See generally* McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249 (1989).

19. *See infra* note 58.

20. *See generally* South Carolina v. Katzenbach, 383 U.S. at 315-22; 1965 Act, Section 5 (codified at 42 U.S.C. § 1973c (1988)).

21. For example, if African-Americans constitute 40% of the population in an at-large county election which elects ten county commissioners, the substantial minority vote is cancelled out if the white majority votes as a bloc for the same ten white candidates. Thus, even though the minority group represents 40% of the total vote, they cannot even elect one representative, or 10% of the government officials. However, in an electoral scheme with ten single-member districts, the African-American voters could probably constitute a majority in four single-member districts and would have greater opportunity to elect the candidates of their choice.

22. In *White v. Regester*, the Supreme Court found for the first time a multi-member district to be an unconstitutional violation of the fourteenth amendment and the Voting Rights Act of 1965.

Minority vote dilution is the recognized doctrine that provides the legal ground of action for all current voting rights challenges to at-large electoral systems, including at-large state judicial elections. Actionable vote dilution occurs whenever an electoral procedure is employed that effectively reduces the opportunity for minority voters to select the candidates of their choice.[23] The theoretical basis for voting rights violations under the doctrine of minority vote dilution "is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters."[24]

Challenges to at-large judicial elections are the natural progeny of previous challenges to multi-member districts for the election of legislators and executive officials.[25] The Supreme Court recognized in dicta the possibility of an effective challenge to multi-member legislative districts as early as 1965 in *Fortson v. Dorsey*.[26] But, it was not until 1973, in *White v. Regester*, that the Court upheld a particular vote dilution challenge by minority voters to a multi-member district.[27] Plaintiffs' claims

Although the term "vote dilution" was not employed, the Court found that minority voters were "invidiously excluded" from the political process by the multi-member district (*i.e.*, at-large scheme). 412 U.S. 755, 769 (1973). *See infra* notes 44-48. The Court definitively addressed and developed the concept of minority vote dilution in *Thornburg v. Gingles*, imposing three threshold requirements to prove the existence of actionable minority vote dilution. *See* 478 U.S. 30, 50-51 (1986); *infra* notes 64-70 and accompanying text.

23. The Supreme Court first found an actionable claim that minority vote dilution violated the fifteenth amendment in *Gomillion v. Lightfoot*, where the City of Tuskegee redrew its boundaries to exclude the African-American population. 364 U.S. 339 (1960). The effect was that African-Americans had a decreased opportunity to select the representatives of their choice within the City of Tuskegee. *Id.* at 347.

24. *Gingles*, 478 U.S. at 48.

25. Challenges to at-large systems for various local governing bodies have eliminated at-large elections and produced a dramatic increase in the number of African-American elected officials on local school boards, city councils, and county commissions. *See* Sherman, *supra* note 4, at 24 and accompanying text (noting statistics that between 1977 and 1987 the number of local African-American elected officials increased from approximately 3,500 to 5,500).

26. 379 U.S. 433, 439 (1965). In this challenge to Georgia's 1962 Senate reapportionment plan, the Supreme Court reversed a district court finding that the multi-member districting plan unconstitutionally diluted minority voting strength. The Supreme Court held that the plaintiffs presented "no proof to support" their claim, but in dicta stated that: "It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.* at 439. *See also* Burns v. Richardson, 384 U.S. 73, 86 (1966). In *Burns*, plaintiffs challenged a Hawaiian legislative reapportionment scheme with multi-member districts. The Court held that "an invidious result must appear from evidence in the record" to uphold the challenge. *Id.* at 88. In *Whitcomb v. Chavis*, although the Court did not find the multi-member districts unconstitutional per se, it stated: "we have deemed the validity of multi-member district systems justiciable. . . . But we have insisted that challengers carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements." 403 U.S. 124, 143-44 (1971).

27. *See* White v. Regester, 412 U.S. 755, 766 (1973). *White* was the first time the Court struck down a legislative redistricting plan that established multi-member districts. The Court upheld the

in *White* and its predecessors were based on the right to political representation and participation under the equal protection clause of the fourteenth amendment.[28] Moreover, of pivotal significance, *White* established the "results test" as the relevant legal standard in voting discrimination cases.[29] Under the "results test," plaintiffs were not required to demonstrate that defendants purposefully discriminated by instituting the challenged electoral practice. Instead, plaintiffs could prevail by merely showing that the challenged practice resulted in decreased access and opportunity for minority voters to participate in the political process.[30]

The failure of prior civil rights legislation[31] and case-by-case litigation during the 1950's and early 1960's convinced Congress that the stringent measures proposed in the Act were essential to dismantle racial barriers in the American political system, particularly in the Southern states.[32] Despite the historic achievements of the Act,[33] electoral proce-

district court's findings based on the "totality of the circumstances" which demonstrated that the multi-member districts "effectively excluded [the African-American community] from participation in the Democratic primary selection process" and "invidiously excluded Mexican-Americans from effective participation in political life, specifically in the election of representatives to the Texas House of Representatives." *Id.* at 767, 769. *See also* Graves v. Barnes, 343 F. Supp. 704, 727-32 (W.D. Tex. 1972) (district court finding that "totality of circumstances" combined with the challenged procedure to exclude Mexican-Americans and African-Americans from the political process).

28. U.S. CONST. amend. XIV. See *White*, 412 U.S. at 767, affirming that "the District Court considered Mexican-Americans in Bexar County to be an identifiable class for Fourteenth Amendment purposes and proceeded to inquire whether the impact of the multimember district on this group constituted invidious discrimination." *See also Whitcomb*, 403 U.S. at 127 ("We have before us in this case the validity under the Equal Protection Clause of the statutes districting and apportioning the State of Indiana for its general assembly elections."); *Burns*, 384 U.S. 73 (where the court held that creation of multi-member Senatorial districts by Hawaiian legislators did not automatically violate the equal protection clause of the fourteenth amendment); and Fortson v. Dorsey, 379 U.S. 433, 435 (1965) (where "appellees, registered voters of Georgia brought this action . . . seeking a decree that the requirement of county-wide voting in the seven multi-district counties violates the Equal Protection Clause of the Fourteenth Amendment.").

29. *White*, 412 U.S. at 766-70. *See Gingles*, 478 U.S. at 44 n.8. The *White* "results test" was also employed in Zimmer v. McKeithen, 485 F.2d 1297, 1304-07 (5th Cir. 1973), *aff'd sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

30. *Gingles*, 478 U.S. at 44 n.8.

31. *See, e.g.*, the Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended in scattered sections of 18, 42 U.S.C. (1982)); and the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 18, 28, 42 U.S.C. (1982)). *See generally* South Carolina v. Katzenbach, 383 U.S. 301, 311-15 (1966).

32. *See Katzenbach*, 383 U.S. at 308-09, 311-15. *Katzenbach* upheld the constitutionality of the Voting Rights Act of 1965 and traced the failure of legislative, judicial, and administrative efforts prior to the passage of the 1965 Act. *See generally* McDonald, *supra* note 18, at 1521.

33. The Act has, in fact, eradicated the most flagrant violations of the right to vote, particularly literacy tests, poll taxes, and other voter registration requirements. *See* McDonald, *supra* note 18, at 1250-52. *See also* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3. The Commission's report presented statistics for the seven Southern states targeted by the Act. For example, African-American voter registration increased from 29.3% prior to the Act to 56.6% by 1972. This dramatic rise markedly decreased the gap between white and African-American voter registration from 44.1% to just 11.2% during the same period. *Id.* at 43. Furthermore, prior to the Act, there were "well under

dures that exclude African-Americans and other minorities from full political participation in the electoral arena have persisted. Thus, even though minority voters have realized the formal right-to-vote, minority vote dilution remains as an impediment to full equality in voting rights. Various devices such as gerrymandering,[34] anti single-shot provisions,[35] or primary run-off requirements[36] can all result in abridgment of the right to vote. However, arguably the most prevalent electoral procedure that capitalizes on racial prejudices, and perpetuates the historical legacy of racial discrimination in voting, is the at-large electoral district.[37]

Despite their discriminatory potential, at-large districts are not *per se* unconstitutional. Rather, the plaintiff who challenges the at-large system bears the burden of proving that the at-large system itself, and not some other extrinsic factor, has produced the discriminatory result.[38] The plaintiff must demonstrate that the at-large system, combined with racial bloc voting, denies minority voters the opportunity to elect their preferred candidates.[39]

A. Finding a Voting Rights Violation: "Results vs. Intent"

Section 2 of the Act does not require plaintiffs to prove that defend-

100 black elected officials" in the seven states. *Id.* at 49 (citing U.S. COMMISSION ON CIVIL RIGHTS, POLITICAL PARTICIPATION 15 (1968)). However, by 1974, the number of African-American elected officials in the seven states increased to 963. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at 49-51, Tables 5, 6.

34. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960). The gerrymandering of Tuskegee's African-American population thereby diluted the African-American vote of the city: "the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." *Id.* at 347.

35. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 184 n.19 (1980). In *City of Rome*, the city changed its at-large voting procedure for election to the City Commission and the Board of Education. Candidates previously required only a plurality to win and voters could employ single-shot voting, *i.e.*, voters could cast their ballot for just one candidate instead of a full slate. The new system forced voters to cast ballots for a full slate of candidates in a multiple-candidate field. This anti-single-shot requirement prevented minority voters from concentrating their votes behind a limited number of candidates by withholding votes from other candidates on the slate. The new procedure resulted in dilution of the minority vote and decreased opportunity for minority voters to elect their preferred candidates. *Id.*

36. Primary run-off requirements where no candidate receives either a majority of the vote or a threshold plurality have been held unconstitutional in the context of at-large voting for a multi-member body. For example, voters may be allowed to cast five votes in a multi-candidate field to select five city council members. If a candidate must receive a majority of the vote to win, the minority voters may be able to generate enough votes to place one or several candidates in the top five slots, but not enough to get over the majority threshold. In a run-off, racial bloc voting by the white majority would consistently defeat the preferred minority candidates. *See, e.g., City of Rome*, 446 U.S. at 184 n.19; City of Port Arthur v. United States, 459 U.S. 159 (1982).

37. *See* Thornburg v. Gingles, 478 U.S. 30, 47 (1986). *See also* McDonald, *supra* note 18, at 1256-57 ("Vote dilution can take many forms. . . . Perhaps the preeminent form of vote dilution today is at-large voting, or multimember districting.").

38. *Gingles*, 478 U.S. at 46.

39. *Id.* at 47-50.

ants purposefully discriminated against minority voters to establish a voting rights violation. Although the Supreme Court in 1980 replaced the objective "results test" of *White* with a subjective "intent" requirement in *City of Mobile v. Bolden*,[40] this judicial reversal prompted the 1982 congressional amendments to the Act which explicitly re-imposed the "results test."[41]

Originally, the Supreme Court employed the objective "results test" in *White* to determine that minority voters were unlawfully denied access to the political process under Texas' multi-member legislative district scheme. In *White*, African-American and Mexican-American voters claimed that a Texas redistricting plan, which set up multi-member legislative districts, excluded them from the political process.[42] Plaintiffs were not required to prove that defendants employed the multi-member district with the express intent or purpose to discriminate against the minority group.[43] Rather, the Court coupled a "totality of the circumstances" test with a "results" test, thereby imposing a two-step burden on plaintiffs. First, plaintiffs had to demonstrate that the minority group failed to obtain legislative representation in proportion to their voting potential. Second, plaintiffs were required to show that the minority group was subject to a history of discriminatory practices which lowered their socio-economic status, restrained their capacity to fairly compete in the electoral arena, and effectively precluded their access to the political process.[44]

In *White*, the Court applied this two-part test by first recognizing plaintiffs' evidence that since Reconstruction, only two African-Americans and five Mexican-Americans had ever been elected to the Texas

40. 446 U.S. 55 (1980). *See infra* notes 50-56 and accompanying text.

41. Voting Rights Act of 1965, Sec. 2, *as amended by* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973 (1988)). *See infra* note 59 and accompanying text for full language of section 2.

42. White v. Regester, 412 U.S. 755, 766-70 (1973).

43. *Id.* The Court reiterated prior holdings in *Fortson*, *Burns*, and *Whitcomb*, that at-large districts were not per se unconstitutional. Rather, to sustain plaintiffs' claims, the court not only required a showing that the at-large system resulted in inequitable under-representation, but:

> [p]laintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Id. at 766 (citing *Whitcomb*, 403 U.S. at 149-50).

This "results test" was implicit in *Fortson v. Dorsey*, where the Court recognized the possibility that Georgia's 1962 at-large legislative reapportionment scheme might be unconstitutional, "designedly or otherwise." 379 U.S. 433, 439 (1965). *See also Gingles* 478 U.S. 30, 35 (1986) (defining *White* as the relevant legal standard for the "results test").

44. *White*, 412 U.S. at 766-70. See *Zimmer v. McKeithen* which summarized the multiple factors from *White* that would determine whether a minority group lacked access to the political process. 485 F.2d 1297, 1304 (5th Cir. 1973). *See infra* note 58 for a summary of the seven key factors.

House of Representatives from the two counties which imposed the at-large procedures.[45] Second, the Court acknowledged proof by plaintiffs that a long history of discrimination against both minority groups in the fields of education, health, economics, and politics effectively barred the minority voters from full participation in the political process. Finally, the Court took special note of the local Democratic Party's slating process, which refused to slate non-white candidates, and the Party's racial appeals to white voters in campaigns against minority candidates.[46] Thus, proof of under-representation in the particular jurisdictions, combined with a legacy of pervasive discrimination against the minority voters, was sufficient to outlaw the challenged electoral procedure.[47]

In contrast to the objective "results test" adopted in the voting rights arena (under *White* and its progeny),[48] the Supreme Court traditionally applied a stricter subjective "intent" standard in challenges to racial discrimination based on the equal protection clause of the fourteenth amendment.[49] In 1980, a sharply divided Court[50] applied this stricter standard to voting rights cases as well. In *City of Mobile v. Bolden*, the Court reversed its position, repudiated *White*, and estab-

45. *White*, 412 U.S. at 766, 768-69. In fact, Mexican-Americans comprised 29% of the county's total population. *Id.* at 768.

46. *Id. See also* Graves v. Barnes, 343 F.Supp. 704, 727-32 (W.D. Tex. 1972). In *Graves*, the district court outlined the discriminatory conditions faced by African-American and Mexican-American voters that pervaded the customs and institutions of the Texas counties. The court concluded that these inequalities could only be compensated for by the establishment of single-member districts that would allow minority voters to participate in the electoral process and to elect their preferred candidates.

47. *See also Zimmer*, 485 F.2d 1297, where the Fifth Circuit relied on *White* to invalidate a multi-member school board and police jury.

48. *See, e.g.*, East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). Relying upon the fourteenth and fifteenth amendments and section 2 of the Act, the Court sustained a Louisiana citizen's challenge to the creation of at-large districts for election of police, jury, and school board members because "no special circumstances here dictate the use of multi-member districts." *Id.* at 639. *East Carroll Parish* affirmed *Zimmer* which outlined the seven factors to be considered to meet the discriminatory-effects standard later adopted by Congress in the 1982 amendments to the Act. 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Bd.*, 424 U.S. at 639.

49. Subsequent to *White*, the Court considered a number of equal protection claims outside the electoral arena. In each instance, the Court held that a law must be proven to be intentionally or purposefully discriminatory. For example, in the fields of racial discrimination in public employment (Washington v. Davis, 426 U.S. 229 (1976)), sex discrimination in public employment (Personnel Administrator v. Feeney, 442 U.S. 256 (1979)), and racial discrimination in zoning (Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977)), the Court required that the plaintiff demonstrate purposeful discrimination to prevail in a claim brought under the equal protection clause of the fourteenth amendment.

50. In fact, six justices wrote separate opinions. No clear majority supported Justice Stewart's opinion that section 2 required discriminatory intent. City of Mobile v. Bolden, 446 U.S. 55 (1980). *See* Jones v. City of Lubbock, 640 F.2d 777 (5th Cir. Unit A Mar. 1981). Responding to the *Bolden* ruling, the 5th Circuit stated that "[t]he Supreme Court is not a unified body. . . . There was no majority opinion on the proper test to be employed in assessing the legality of an electoral system alleged to discriminate against minority citizens." *Id.* at 778.

lished a subjective intent standard for all vote dilution claims under the fifteenth amendment of the Constitution and section 2 of the Act.[51] The intent standard of *Bolden* required that a plaintiff prove that the defendant jurisdiction established or utilized the challenged electoral procedure to purposefully deny or abridge the right to vote on account of race.

The impact of *Bolden* devastated existing voting rights challenges. Numerous cases premised on the *White* "results" standard were either abandoned, rejected, remanded, reversed, or vacated, even where incontrovertible evidence demonstrated that minority voters were totally excluded from the political process.[52] Except in those rare instances where plaintiffs had direct "smoking gun" evidence[53] of racist intent of legislators to shut minorities out of the political process, plaintiffs were left without a remedy. A glaring example was *McCain v. Lybrand*,[54] where a South Carolina district court vacated its judgment (entered five days before *Bolden* was announced) that Edgefield County's at-large council elections were unconstitutional. Although African-Americans constituted 51.6% of the county population, not one African-American had ever been nominated in the Democratic primary or elected to office in a contested election.[55] The court held that "the plaintiffs have not proved that the voting plan for election of members of the County Council in Edgefield County was either conceived or is operated as a purposeful device to further racial discrimination."[56]

51. *Bolden*, 446 U.S. at 60-61, 72-73.

52. *See, e.g.*, *Jones*, 640 F.2d at 777 (Fifth Circuit reversed and remanded district court ruling that Lubbock's at-large city council elections discriminated against Mexican and African-American voters in Lubbock); Kirksey v. City of Jackson, 625 F.2d 21 (5th Cir. 1980) (vacating and remanding district court judgment sustaining plaintiff's claim that the at-large system of electing the mayor and two city commissioners was unconstitutional); Washington v. Finlay, 634 F.2d 913 (4th Cir. 1981) (rejection of challenge to at-large city council elections); Thomasville Branch of NAACP v. Thomas County, 639 F.2d 1384 (5th Cir. Unit B Mar. 1981) (Fifth Circuit ruled for defendants, reversing district court judgment striking down at-large county elections); Cross v. Baxter, 639 F.2d 1383 (5th Cir. Unit B Mar. 1981) (affirming dismissal of challenge to at-large city council elections); McMillan v. Escambia County, 638 F.2d 1239 (5th Cir. 1981) (reversed district court finding that at-large election for county commissioners was unlawful; affirmed finding below that the school board and city council at-large elections were purposefully discriminatory), *vacated*, 688 F.2d 960 (5th Cir. 1982) (based on discriminatory intent of defendants, district court ruling found not clearly erroneous). The cases above are cited in Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 735-37 (1983).

53. See, *e.g.*, Perkins v. City of W. Helena, where aldermen openly admitted that they voted to retain at-large elections to the city council in order to retain their seats. 675 F.2d 201, 214 (8th Cir. 1982), *aff'd mem.*, 459 U.S. 801 (1982). *See generally* Parker, *supra* note 52, at 737 n.109.

54. McCain v. Lybrand, No. 74-281 (D.S.C. Apr. 17, 1980), *vacated*, (D.S.C. Aug. 11, 1980), *reprinted in* 128 Cong. Rec. 14121-25 (daily ed. June 17, 1982) (introduced into the record by Senator Ernest Hollings (S.C.) during the Senate debate over the 1982 amendments to demonstrate the impact of the *Bolden* standard of discriminatory intent in voting rights cases).

55. *McCain*, No. 74-281 (D.S.C. Apr. 17, 1980), *reprinted in* 128 Cong. Rec. at 14122.

56. *McCain*, No. 74-282 (D.S.C. Aug. 11, 1980) (order vacating April 17, 1980 judgment), *reprinted in* 128 Cong. Rec. at 14125.

The *Bolden* requirement of discriminatory intent came under a barrage of criticism from legal scholars and voting rights litigants.[57] In response, Congress amended the Act in 1982 to definitively resolve questions about its legislative intent regarding the issue of "discriminatory intent" versus "discriminatory results" in voting rights challenges under the Act. The amended Act conclusively established that a section 2 voting rights violation could be proven merely by a showing of discriminatory effect "based on the totality of the circumstances,"[58] *i.e.*, a showing that minority voters were denied equal access to the political process. Section 2, as amended, reads in full:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b). (emphasis added)
>
> (b) A violation of subsection (a) is established if, based on the *totality of the circumstances*, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. [emphasis added] The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the

57. *See* Parker, *supra* note 52, at 737 n.110.

58. The "totality of the circumstances" test derived from White v. Regester, 412 U.S. 755, 765-70 (1973). This test was further articulated by the Fifth Circuit in Zimmer v. McKeithen, 485 F.2d 1297, 1304 (1973), and upheld by the Supreme Court in East Carroll Parish School Bd. v. Marshall, *aff'd sub nom.* 424 U.S. 636 (1976). The typical factors for the "totality of the circumstances test" were incorporated into the Senate Judiciary Committee Report that accompanied the Act. S. REP. NO. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 206-07. *See also* Thornburg v. Gingles, 478 U.S. 30, 36-37 (1986).

The "totality of the circumstances" included (but were not limited to) the following "typical factors" to determine if the challenged electoral device or procedure constituted a voting rights violation in the particular political jurisdiction:

1) history of official discrimination that prevented minority participation in the political process;
2) degree of racially polarized voting;
3) use of unusually large electoral districts that enhance opportunity for discrimination;
4) exclusion of minorities from candidate slating processes;
5) extent of discrimination against minorities in other areas such as education, health, and employment which might hinder effective participation in the political process;
6) the use of subtle or overt racial appeals in political campaigns; and
7) number of minorities elected to public office.

Gingles, 478 U.S. at 36-37.

population.[59] (emphasis in original)

The Senate report which accompanied the amendments outlined three principal reasons why the intent test was repudiated. First, the intent test was "unnecessarily divisive" because it forced minority groups to prove that local or state officials were purposefully racist. Second, plaintiffs had to bear an "inordinately difficult" burden of proof that the defendant jurisdiction acted racist in a purposeful manner. Third, it "ask[ed] the wrong questions," *i.e.*, it focused on the culpability of the defendant jurisdiction, rather than the rights of the minority voter.[60]

Finally, in 1986 the Court formally overruled *Bolden* in *Thornburgh v. Gingles*.[61] In *Gingles*, African-American voters challenged six multi-member legislative districts for the North Carolina Senate and House. Plaintiffs offered proof of the historic discrimination against African-Americans in education, employment, and other spheres of North Carolina society; of under-representation of African-Americans in the North Carolina legislature; and finally of how the challenged multi-member district perpetuated the inability of African-Americans to elect their preferred candidates.[62] The Court held that such discriminatory effect alone was sufficient to prove a violation of section 2 of the Act.[63] As stipulated by the amended section 2(b) of the Act, the Court re-adopted the "results test" of *White* and the "totality of the circumstances test" as developed in *Zimmer*.[64] Notwithstanding that *Bolden* was legislatively overruled, it is instructive today because it illustrates the implication of exempting judicial elections from the "results test" of section 2. If the Court holds that section 2 of the Act is not applicable to judicial elections, the same subjective "intent" requirements of *Bolden* arguably will be revisited upon voting rights litigants who challenge multi-member judicial districts under the fifteenth amendment. If section 2 is not extended to judicial elections, plaintiffs' only avenue of attack against discriminatory electoral procedures for judges will be on either fourteenth or fifteenth amendment grounds. This would present a far greater burden for plaintiffs who will then have to prove that defendants established the multi-member judicial districts with discriminatory intent. Under this difficult

59. Voting Rights Act of 1965, Section 2, *as amended by* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973 (1988)).

60. S. REP. No. 417, 97th Cong., 2d Sess. 28, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 206 (quoted in *Gingles*, 478 U.S. at 44).

61. 478 U.S. at 43-46, 74.

62. *Id.* at 38-42.

63. *Id.* at 74.

64. *Id.* at 35-38. See *supra* note 58.

standard, plaintiffs can only prevail if they can provide the "smoking gun" of discriminatory intent.

B. *Racial Bloc Voting and Threshold Criteria of* Gingles

In *Thornburg v. Gingles*, the Court reiterated its pre-*Bolden* holdings, and defined the essence of a section 2 claim as the interaction of the challenged electoral procedure with social and historical conditions (*i.e.*, "totality of the circumstances") that result in decreased opportunity for minority voters to select their own representatives.[65] However, the Court also mitigated the effect of the more liberal "results test" by imposing three additional threshold prerequisites that plaintiffs must satisfy before they can demonstrate that the "totality of the circumstances" constitute a section 2 violation.

First, a successful claim of minority vote dilution must demonstrate that the protected minority class is sufficiently large enough and geographically insulated to constitute a majority of the population in a single-member district established according to proportionate one-man one-vote principles.[66] Second, challengers to the multi-member district must demonstrate that the minority group is politically cohesive so that it could elect its own candidates in a single-member district where it constituted a numerical majority.[67] Political cohesion generally refers to the sufficiency of the minority group's political maturity, unity, and will that would enable it to prevail in a fairly-drawn electoral system. If the minority group cannot demonstrate such political cohesion, then the group's inability to elect its own representative cannot be accurately attributed to the multi-member district.[68] Third, the minority group must demonstrate that racial bloc voting by the white population usually defeats the efforts of the minority group to elect their preferred representatives.[69]

The purpose of the *Gingles* threshold criteria is to force a plaintiff minority group to prove that it is the multi-member district itself, not some other factor, that is responsible for the inability of the minority group to successfully elect its preferred representatives.[70] Furthermore,

65. Thornburg v. Gingles, 478 U.S. 30, 47 (1986).
66. *Id.* at 50.
67. *Id.* at 51.
68. *Id.* at 58, 68-70.
69. *Id.* at 51.
70. The *Gingles* criteria that minority plaintiffs must prove capacity to elect their own candidate forecloses actionable claims of minority vote dilution where the racial minority is geographically dispersed or otherwise incapable of constituting a majority. Thus, minority vote dilution that results in the inability to influence elections—as opposed to the ability to elect—is precluded under

these threshold criteria and the amended Act were consistent with three previous Court policies that limited the circumstances under which section 2 violations might be proved: first, that multi-member districts are not *per se* unconstitutional; second, that protected minority groups are not automatically entitled to equal representation in government; and third, that plaintiffs must rely upon the "totality of the circumstances test" to show additional evidence that racial discrimination has prevented minority access to political representation.[71]

The importance of the 1982 amendments to the development of the concept of minority vote dilution cannot be overstated. The effect of the amendments in lightening plaintiffs' burden of proof was often decisive in making a minority vote dilution case viable. Flagrant abuses of the right-to-vote such as literacy tests, registration requirements, and poll taxes in the Southern states of the old Confederacy were the principal targets of the Act in 1965.[72] The Act did abolish such abuses and secure the formal right-to-vote for African-Americans in the South.[73] However, minority vote dilution—resulting primarily from multi-member districts—remained as a subtle, but effective, barrier to minority political participation at the municipal, county, and state levels of government in every region of the country.[74] It is extremely difficult to prove that at-large districts (which often were established decades in the past) were purposefully established to deny minority voters the opportunity to elect their preferred candidates.

When it passed the 1982 amendments, Congress did not merely intend to lighten plaintiffs' burden of proof in voting rights litigation by abolishing the "intent" requirement. The amendments also sought to broaden the Act's scope of protection for minority voters in all electoral spheres, especially the vote dilution cases.[75] Subsequently, the *Gingles*

the *Gingles* criteria. *See generally* Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449 (1988). *See also* McDonald, *supra* note 18, at 1282-84.

71. *Gingles*, 478 U.S. at 46; White v. Regester, 412 U.S. 755, 766 (1973).

72. *See* South Carolina v. Katzenbach, 383 U.S. 301, 315 (1965); and 1965 Act, *supra* note 2, at section 4 (a)-(d).

73. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3. *See also* Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 548-49 (1973).

74. *See* Whitcomb v. Chavis, 403 U.S. 124, 157 n.37 (1971) (citing statistics that as of 1970, 46% of the state senates and 62% of the state houses in the entire country had some type of multi-member districts).

75. *See* Velazquez v. City of Abilene, Tex., 725 F.2d 1017 (5th Cir. 1984), where even prior to *Gingles*, the congressional "results test" was employed when the court sustained a successful challenge to the at-large elections for the Abilene City Council without a showing of discriminatory intent by the mayor and city council persons. Subsequent to *Gingles*, minority groups successfully challenged numerous municipal, county, and state multi-member districts. *See, e.g.*, Solomon v. Liberty County, 899 F.2d 1012 (11th Cir. 1990); Collins v. City of Norfolk, 883 F.2d 1232 (4th Cir.

focus on racial bloc voting as *the* threshold question has provided a rational basis for courts to decide numerous challenges to municipal, county, and state at-large systems.[76] Reliance by the courts upon imprecise standards such as discriminatory "intent" or "the totality of the circumstances" have been replaced with an inquiry into objective voting data that demonstrates racial bloc voting.[77] The statistical methods of homogenous precinct analysis,[78] regression analysis,[79] and multivariate analysis[80] are now used to determine whether racial bloc voting exists. Minority vote dilution, previously an inexact term, is now ascertained in

1989); Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987); Brown v. Board of Comm'rs, 722 F. Supp. 380 (E.D. Tenn. 1989).

The impact of the 1982 amendments is revealed by the following statistics. In the three years prior to the passage of the 1982 amendments of section 2, less than six hundred jurisdictions altered their electoral procedures. However, in the three years after the amendments were passed, the number dramatically increased to 1,354. *See* McDonald, *supra* note 18, at 1280 (citing statistics from CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, ENFORCING THE LAW, VOTING 2 (Jan. 20, 1981-Jan. 31, 1987)).

76. *See* McDonald *supra* note 18, at 1279-82. Prior to the 1982 amendments and the *Gingles* decisions, vote dilution cases were rarely settled expeditiously and plaintiffs bore inordinate practical burdens. The imprecise standards of the "totality of the circumstances test" compelled plaintiffs to expend large amounts of money and time to prove dilution claims. Litigation routinely dragged through numerous appeals and remands where different judges would apply identical evidence to the test and reach different conclusions. For example, *City of Mobile v. Bolden* "took eight years to litigate and the plaintiffs' lawyers spent 5525 hours and approximately $96,000 in out-of-pocket costs to prosecute the case." McDonald, *supra* note 17, at 1279 n.173 (citing Bolden v. City of Mobile, Civ. No. 75-297-P (S.D. Ala. Dec. 12, 1983) (order on attorneys' fees and expenses).

77. In all recent vote dilution cases, the courts rely on statistical evidence by experts to prove the existence of racial bloc voting. *See, e.g., Solomon*, 899 F.2d at 1019-20; *Citizens for a Better Gretna*, 834 F.2d at 500-03; *Brown*, 722 F. Supp. at 391-93. *But see* Overton v. City of Austin, 871 F.2d 529, 537-39 (5th Cir. 1989) (court affirmed that plaintiffs' expert witness presented statistical evidence that was not probative of racial bloc voting).

78. *See* Engstrom & McDonald, *Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*, 17 URB. LAW. 369, 371-73 (1985); Loewen & Grofman, *Recent Developments in Methods Used in Vote Dilution Litigation*, 21 URB. LAW. 589, 600-02 (1989). Homogeneous precinct analysis is used to determine voting patterns of racial groups where sample precincts exist that are heavily dominated by one racial group. Thus, if all precincts that are over 90 percent white are compared with precincts that are 90 percent African-American, the extent of racial bloc voting can be determined. *See, e.g., Solomon*, 899 F.2d at 1019 (the court accepted homogeneous precinct analysis as evidence of racial bloc voting).

79. *See* Engstrom & McDonald, *Quantitative Evidence in Vote Dilution Litigation, Part II: Minority Coalitions and Multivariate Analysis*, 19 URB. LAW. 65, 66-70 (1987) [hereinafter Engstrom & McDonald-II]; Loewen & Grofman, *supra* note 78, at 590-96. Regression analysis shows the correlation between the percentage of registered voters of a racial group in a precinct and the percentage that a particular candidate received. This relation is plotted on a graph with each precinct representing a specific axis. A line is drawn that best approximates the center of the sample precincts. The steeper the slope, the higher the "correlation coefficient" which measures the extent of racial bloc voting.

80. *See* Engstrom & McDonald-II, *supra* note 79, at 70-75. Multivariate analysis is employed when the voting patterns of two or more minority groups must be determined. Thus, if the voting patterns of African-Americans and Hispanics need to be distinguished from the voting patterns of whites, multivariate analysis can relate additional variables such as the number of Hispanics and African-Americans in a particular precinct to determine racial bloc voting.

litigation through a relatively objective statistical determination.[81] Although the "panoply of factors" articulated by the *Zimmer* court[82] to probatively establish discriminatory effect are still relevant, their primacy is now superseded by the more scientific *Gingles* prerequisites. As the Fifth Circuit recently held, "[r]acial bloc voting is the linchpin of a § 2 vote dilution claim."[83]

II. ARE STATE JUDGES "REPRESENTATIVES" UNDER SECTION 2 OF THE VOTING RIGHTS ACT?

In the past few years, voting rights litigants have relied upon section 2 to challenge the use of multi-member judicial districts for the election of state judges.[84] The outcomes in these suits have great import for the entire country since forty-one states elect at least some of their judges in some type of at-large popular election.[85] Since *Gingles*, voting rights litigants in at least eight states—Ohio,[86] Illinois,[87] Louisiana,[88] Alabama,[89] Mississippi,[90] North Carolina,[91] Georgia,[92] and Texas[93]—have sought relief in the federal courts to dismantle judicial multi-member districts. Plaintiffs have charged that state judiciaries remain one of the last white male sanctuaries of state governments.[94] Although there is no certain explanation why state judiciaries remained outside the scope of voting

81. *See also* Thornburg v. Gingles, 478 U.S. 30, 51 (1986).

82. Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973). *See supra* note 58.

83. *See, e.g.*, Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496, 499 (5th Cir. 1987). As in most modern successful challenges under section 2 of the Act, the court relied on correlation and regression analysis to strike down Gretna's municipal at-large elections. Such statistical analysis correlates by precinct the race of the voters with the votes received by the candidates.

84. *See* Sherman, *supra* note 4; Note, *State Judicial Elections and the Voting Rights Act: Will Section 2 Protect Minority Voters?*, 23 GA. L. REV. 787 (1989).

85. *See* 28 COUNCIL OF STATE GOVERNMENTS, *supra* note 10; Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1087 (1966); Greenhouse, *supra* note 15, at 17, col. 1 (referring to the Justice Department brief that urged the Supreme Court to resolve the instant issue).

86. Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988).

87. Williams v. State Bd. of Elections, 718 F. Supp. 1324 (N.D. Ill. 1989).

88. Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988).

89. Southern Christian Leadership Conf. v. Siegelman, 714 F. Supp. 511 (M.D. Ala. 1989).

90. Martin v. Allain, 658 F. Supp. 1183 (S.D. Miss. 1987).

91. Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986). *Haith* addressed whether the section 5 preclearance provision of the Act applied to new electoral procedures adopted by North Carolina for the selection of judges, including the creation of multi-member judicial districts. *See infra* notes 225-38 and accompanying text for a full discussion of section 5 and judicial elections.

92. Brooks v. State Bd. of Elections, No. 288-146 (S.D. Ga. Dec. 14, 1989) (LEXIS, Genfed library, Dist file). The plaintiffs challenged state statutes that created 77 new superior court judgeships and five new circuits under section 2 and under the section 5 preclearance provisions of the Act.

93. *LULAC II*, 914 F.2d 620 (5th Cir. 1990).

94. *See* Sherman, *supra* note 4; Greenhouse, *supra* note 15, at 17, col. 1.

rights litigation until very recently, the issue has now been thrust four-square before the federal courts.

A. LULAC II: *A Judicial Exemption for Judicial Elections*

Until the September, 1990 *LULAC II* decision, a consensus in the federal courts that section 2 of the Act applied to judicial elections was clearly emerging. *LULAC II* has now shattered that nascent consensus and breathed new life into the argument that judges are not "representatives" covered under section 2 of the amended Act.[95] This argument—whether the use of the term "representatives" in section 2(b) includes judges—has been at the heart of every defense by state and local jurisdictions resisting voting rights attacks aimed at their multi-member judicial districts.

The en banc court in *LULAC II* chose not to define judges as "representatives" for the following three reasons. First, the *LULAC II* majority relied on the Supreme Court's affirmance of *Wells v. Edwards*, which held that judges are not considered "representatives" for purposes of the "one-person one-vote" principle.[96] Thus, the *LULAC II* majority held that it would be inconsistent to state that judges are not "representatives" for one-person one-vote dilution claims, but are "representatives" for minority vote dilution claims.[97] Second, the *LULAC II* majority further held that Congress did not intend to extend the Act to judges. The majority claimed that even if Congress intended to extend the Act to judges in 1965, that intent was superseded by the 1982 amendments, where Congress re-instated the "results test" for section 2 claims. The majority reasoned that in 1982, Congress was presumably aware of *Wells* and the Court's refusal to define judges as representatives for purposes of

95. Section 2, as amended in 1982, states:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .

(b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice.

Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973 (1988)) (emphasis added).

96. *See* Wells v. Edwards, 347 F. Supp. 453, 454 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973), holding that elected judges are not considered representatives for purposes of the one-person one-vote principle. *See infra* notes 107-134 and accompanying text for a definition of one-person one-vote principle and its distinction from minority vote dilution.

97. *LULAC II*, 914 F.2d at 626-28.

the one-person one-vote principle.[98] Therefore, according to the majority, Congress' choice of the term "representatives" in section 2(b) must be construed as excluding, rather than including, judges. Finally, the *LULAC II* majority reasoned that the jurisprudential and historical plain meaning of the term "representative" excludes the judiciary.[99] The judiciary, as an impartial and independent branch of government, can never advocate or represent a particular constituency or perspective. Rather, judges serve society as a whole and seek merely to apply existing statutes and common law.[100] Thus, the majority held that judges, by definition, cannot be considered "representatives."[101]

In contrast, the original panel ruling in *LULAC I* took the view that judges are "representatives" for purposes of the Act.[102] Nevertheless, this view also failed to sustain the plaintiffs' claim. However, the panel dismissed the allegations of minority vote dilution on narrower grounds. The panel held that the judges in the targeted districts were not part of an at-large district that could be further subdivided into single-member districts. This approach is referred to as the "single office-holder exception" to minority vote dilution claims. The panel ruling placed trial judges within the "single office-holder" exception because trial judges exercise their authority individually, rather than collegially.[103]

Thus, the seven-judge majority in the en banc opinion went further than necessary to defeat plaintiffs' claim. The majority opted to strike down plaintiffs' claim on the more fundamental grounds that section 2 did not reach judicial elections at all. In fact, the majority declined to even address the "single office-holder" exception. In contrast, the five-judge concurring opinion echoed the panel ruling: defeat plaintiffs' claim under the single office-holder exception, but reject defendants' argument that judicial elections are exempt from section 2 of the Act.[104] Only one judge dissented on both issues, arguing that section 2 of the Act should extend to elected state judges and that trial judges should not be subject to the single office-holder exception.[105] Thus, only a narrow 7-6 majority

98. *Id.* at 622 (Congress was aware that "judicial offices had never been viewed by any court as representative ones").

99. *Id.*

100. *Id.* at 625-28.

101. *Id.* at 629.

102. *LULAC I*, 902 F.2d 293, 299-303 (5th Cir. 1990) (panel ruling).

103. *Id.* at 303-15. *See* Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985). *Butts* was the first articulation of the single-office holder exception in vote dilution cases. *See infra* notes 239-46 and accompanying text.

104. *LULAC II*, 914 F.2d at 635, 645 (Higginbotham, J., concurring).

105. *Id.* at 652, 655 (Johnson, J., dissenting).

in *LULAC II* held that state judges are not representatives covered by section 2 of the Act.

B. Minority Vote Dilution Distinguished From the One-Person One-Vote Principle

For the *LULAC II* majority, the Supreme Court's affirmance of *Wells v. Edwards* verified the prevailing broad consensus in the federal courts that judges are not "representatives."[106] *Wells* involved a challenge to the apportionment plan for the election of Louisiana's Supreme Court justices.[107] Plaintiff brought the suit under the one-person one-vote principle, which bars malapportionment by population in electoral districts.[108] The *Wells* district court reasoned that the one-person one-vote principle was designed to preserve *representative* government and was inapplicable to the judiciary, because the "judiciary, unlike the legislature is not the organ responsible for achieving representative government."[109] In short, the court held that "[j]udges do not represent people, they serve people."[110]

The *LULAC II* majority held that because the courts have not extended the one-person one-vote principle to judicial elections, it would be inconsistent to extend minority vote dilution claims under the fifteenth amendment and section 2 of the Act to multi-member judicial districts.[111] Citing *Zimmer*,[112] the *LULAC II* majority equated the one-person one-vote principle and the doctrine of minority vote dilution, declaring that the latter is dependent on the former, and that both are dependent upon "substantial equality."[113]

106. The majority cited fifteen published opinions which "held or observed" that judges are not "representatives." *LULAC II*, 914 F.2d at 626 n.9. *See infra* note 170.

107. Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973).

108. This principle was first enunciated by the Court in Baker v. Carr, 369 U.S. 186 (1962), and Reynolds v. Sims, 377 U.S. 533 (1964). *See also infra* notes 115-21 and accompanying text.

109. *Wells*, 347 F. Supp. at 456 (quoting New York State Ass'n of Trial Lawyers v. Rockefeller, 267 F. Supp. 148, 153 (S.D.N.Y. 1967)).

110. *Id.* at 455.

111. *LULAC II*, 914 F.2d at 627-28.

112. "Inherent in the concept of fair representation are two propositions: first, that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable; and second, that assuming substantial equality, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population." Zimmer v. McKeithen, 485 F.2d 1297, 1303 (5th Cir. 1973) (footnote omitted) (quoted in *LULAC II*, 914 F.2d at 628).

113. *LULAC II*, 914 F.2d at 628. The concurrence contested this point, stating that one-person one-vote is a race-neutral doctrine premised upon the fourteenth amendment's equal protection clause. *Id.* at 643 (Higginbotham, J., concurring). Although the earlier minority vote dilution cases were also brought under the fourteenth amendment, the doctrine of minority vote dilution now rests firmly on the race-based protections of the Voting Rights Act. *See* White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965) (claims of minority vote dilution brought under the equal protection

By implication, the majority would require plaintiffs to prove violation of the one-person one-vote principle to prevail under a minority vote dilution claim. For the *LULAC II* majority, *Wells* conclusively confirmed that such "substantial equality" in minority vote dilution cases need not extend beyond the legislative and executive branches into the judicial arena.[114]

However, the *LULAC II* majority erred when it equated the doctrine of minority vote dilution with the one-person one-vote principle. Brought under section 2 of the Act, under the fifteenth amendment, or both, minority vote dilution suits are racially-based claims challenging the use of discriminatory electoral schemes, such as multi-member districts. In contrast, the one-person one-vote principle is the basis of vote dilution claims brought under the equal protection clause of the fourteenth amendment against malapportioned electoral districts. First enunciated by the Supreme Court in *Baker v. Carr*[115] and *Reynolds v. Sims*,[116] the one-person one-vote principle is a race-neutral doctrine designed to protect all voters in a state[117] or local district[118] against legislative malapportionment, *i.e.*, to ensure that "the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[119] In short, the one-person one-vote principle guarantees that each elected official represents approximately the same number of constituents, and conversely that "equal numbers of voters can vote for proportionally equal numbers of officials."[120] Although the plaintiffs in both *Baker v. Carr* and *Reynolds v. Sims* happened to be black voters, their

clause of the fourteenth amendment). *Cf.* Thornburg v. Gingles, 478 U.S. 30 (1986); City of Rome v. United States, 446 U.S. 156 (1980) (minority vote dilution claims brought under the Act).

114. *LULAC II*, 914 F.2d at 627.

115. 369 U.S. 186 (1962). The Court entered the "political thicket" of voting rights claims in this seminal case. *Baker* involved a claim against the Tennessee legislature for dividing its electoral districts disproportionately. The Court held for the first time that a justiciable cause of action existed under the fourteenth amendment for debasement of a person's vote by malapportionment.

116. 377 U.S. 533 (1964). The Court held that Alabama had malapportioned its legislative districts based on county lines (instead of population) in violation of the one-person one-vote principle and the equal protection clause of the fourteenth amendment.

117. See *Reynolds*, where the Court rejected the analogy made by defendants of their own state legislature to the U.S. Senate. 377 U.S. at 571-74. The Court prohibited the states from modeling their legislatures on the federal scheme which has an upper house (Senate) apportioned on a geographical basis and a lower house (House of Representatives) apportioned on a population basis. The Court reasoned that the federal model is inapplicable because the congressional form of representation was a product of political compromise and concession to establish the federal republic by bringing together formerly independent states. The fourteenth amendment requires that all citizens must have the same right to vote for their state representatives. *Id.*

118. In congressional elections, article I, section II of the Constitution guarantees that congressional districts will be equally apportioned.

119. *Reynolds*, 377 U.S. at 568.

120. Hadley v. Junior College Dist., 397 U.S. 50, 56 (1970).

claims alleged discriminatory vote dilution based on geography, not on race.[121]

In contrast, minority vote dilution claims rely on the core concerns of the Civil War amendments to protect minority voters from the potent force of particular electoral procedures coupled with racial prejudice.[122] This has even been recognized by those Justices, such as Justice Felix Frankfurter, who opposed the judicial foray into the "political thicket" of malapportionment claims in *Baker v. Carr*. In his dissent, Justice Frankfurter argued against judicial intervention into state political issues, but acknowledged that "cases involving Negro disfranchisement are no exception to the principle of avoiding federal judicial intervention into matters of state government in the absence of an explicit and clear constitutional imperative. An end of discrimination against the Negro was the compelling motive of the Civil War amendments."[123]

Prior to *LULAC II*, federal courts underscored this sharp distinction between the two doctrines, reasoning that the one-person one-vote principle is a race-neutral doctrine that only ensures numerical equality in apportionment of electoral districts; *i.e.*, it merely addresses the ratio of citizens to their elected representatives. The Supreme Court distinguished between the two doctrines in both *Whitcomb*[124] and *White*,[125] where the Court merely required population equality to satisfy apportionment concerns, but insisted that the test for minority vote dilution was whether minority access to the political process was impeded. An Alabama district court, in striking down multi-member districts for the state's circuit and judicial courts, distinguished the one-person one-vote principle from the doctrine of minority vote dilution in the following manner: the doctrine of minority vote dilution ensures the undiluted weight of minority citizens' votes, "*after* the ratio of citizens to elected officials has been determined."[126] Thus, federal courts have held that the distinction between the two doctrines renders *Wells* irrelevant to voting rights challenges under section 2.[127]

121. *See Reynolds*, 377 U.S. at 562, 566 ("Legislators represent people, not trees or acres. . . . Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment . . . ."). *See also* Baker v. Carr, 369 U.S. 186, 244 (1962) (Douglas, J., concurring) ("And so the question is, may a State weight the vote of one county or one district more heavily than it weights the vote in another.").

122. *LULAC II*, 914 F.2d at 643 (Johnson, J., dissenting).

123. *Baker*, 369 U.S. at 285-86 (Frankfurter, J., dissenting).

124. Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971).

125. White v. Regester, 412 U.S. 755, 765 (1973).

126. Southern Christian Leadership Conference v. Siegelman, 714 F. Supp. 511, 521 (M.D. Ala. 1989) (footnote omitted).

127. *See LULAC I*, 902 F.2d 293, 302 (5th Cir. 1990), *rev'd*, 914 F.2d 620 (5th Cir. 1990) (en banc); Chisom v. Edwards, 839 F.2d 1056, 1060-61 (5th Cir. 1988); Mallory v. Eyrich, 839 F.2d 275,

Furthermore, *LULAC II* held that minority vote dilution claims were dependent upon the principle of one-person one-vote.[128] Under this logic, a minority vote dilution claim can never be established unless the one-person one-vote principle is violated. Undoubtedly, minority voters have been the greatest beneficiaries of the reforms fostered by the one-person one-vote principle.[129] However, minority vote dilution can occur even though an at-large district is equally apportioned.[130] Moreover, it is conceivable that compliance with the one-person one-vote principle could adversely affect minority voting power.[131] Thus, the failure of

277-78 (6th Cir. 1988); *Southern Christian Leadership Conference*, 714 F. Supp. at 521; Martin v. Allain, 658 F. Supp. 1183, 1200 (S.D. Miss. 1987).

128. 914 F.2d at 627-28.

129. As the number of African-Americans grew in Georgia's burgeoning urban centers, minority voters were initially unsuccessful in their claim that their votes were not properly counted. *See* South v. Peters, 89 F. Supp. 672, 675 (N.D. Ga. 1950). However, when the Court declared political apportionment a justiciable issue in *Baker v. Carr*, minority voters had a cause of action against such malapportionment. *See, e.g.*, Gray v. Sanders, 372 U.S. 368, 371-74 (1963) (striking down Georgia's statewide primary elections based on the "county unit" where two equal votes were accorded to the winner of each county, thereby giving greater weight to the votes of citizens in the less populous, predominantly white counties); *see also* Westberry v. Sanders, 376 U.S. 1 (1964) (invalidating Georgia's malapportioned congressional districts).

Thus, African-Americans were the primary beneficiaries of the one-person one-vote principle on two levels. First, *Baker v. Carr* broke into the "political thicket" and made the issue of vote dilution a justiciable issue. Second, plaintiffs in most cases (such as *Baker*, *Reynolds*, *Gray*, and *Westberry*) brought under the one-person one-vote principle sought remedies from malapportionment of legislative districts that effectively diluted the votes of citizens in areas that were predominantly African-American.

130. A multi-member legislative district can be fairly apportioned according to one-person one-vote principles relative to other districts in a state. For example, if a state has a population of ten million people, with a state house of 100 representatives, each representative represents 100,000 people under the one-person one-vote principle. If the multi-member district selects ten at-large representatives and the district has a population of one million people, the apportionment scheme conforms to one-person one-vote, even though minority vote dilution might exist.

See, e.g., Gingles v. Edmisten, 590 F. Supp. 345, 350, 376 (E.D.N.C. 1984), *aff'd*, Thornburg v. Gingles, 478 U.S. 30 (1986). In *Gingles*, North Carolina set up six multi-member legislative districts that impermissibly deviated by over 20% from one-person one-vote ideals. North Carolina returned with a new map that permissibly deviated by only 16%. The district court held that even though the multi-member districts conformed to one-person one-vote principles, the challenged districts resulted in unlawful minority vote dilution. *See also* White v. Regester, 412 U.S. 755, 763, 766-70 (1973). In *White*, the Court held that minor variations from one-person one-vote principles in multi-member legislative districts were not unconstitutional, although the Court proceeded to find that the at-large elections unconstitutionally diluted minority votes inside the challenged districts.

At-large elections inside a given county or city for local officials provide a different scenario. The purpose of one-person one-vote is to ensure equality in representation. Thus, no malapportionment exists under at-large elections inside a given jurisdiction, such as a county or city, precisely because there is no apportionment. Rather, all voters are represented by all the elected at-large representatives. In this sense, county or city at-large elections maximize compliance with the one-person one-vote principle. Yet, the at-large procedure creates the possibility of minority vote dilution.

131. *LULAC II*, 914 F.2d at 643 (Higginbotham, J., concurring). Reapportionment to bring districts into demographic conformity could eliminate a minority district or dilute the number of minority voters in that district. For example, the 1990 census threatens to eliminate congressional seats in Midwestern states such as Michigan, Illinois, and Ohio. Thus, minority voting strength in

courts to extend the guarantee of equality in *population apportionment* by judicial districts should have no bearing on the guarantee that minorities will have the right to elect the judicial candidates of their choice once the districts have been apportioned.

The significance of this distinction is further illustrated by the theoretical underpinnings of the two doctrines. *Reynolds v. Sims* rooted the one-person one-vote principle in the constitutional concept of republicanism.[132] Republicanism, or elected representative government, requires that legislators represent equal numbers of citizens. *Wells* merely excluded the judiciary from the one-person one-vote principle because the judiciary "is not the organ responsible for achieving representative government."[133] Practically speaking, the application of one-person one-vote to the judiciary would require a state to distribute its judges on a per capita basis, even though the more rational criteria are the volume and nature of the litigation in various communities.[134] Judges, then, are outside the constitutional paradigm of republican (*i.e.*, representative) government for two reasons: first, their courtroom assignment is not determined on a strict population basis; and second, the Constitution does not mandate that they be elected by those that they serve.[135]

The *LULAC II* majority opinion premised its entire reasoning on the absence of a constitutional requirement for state judicial elections in its opening paragraph: state judges are not "representatives" under section 2 of the Act "for the cardinal reason that judges need not be elected at all."[136] According to the majority, the judiciary as a branch of government is exempt from minority vote dilution claims because its method of selection is not constitutionally mandated.

The majority's reasoning—that government officials are only "repre-

some districts, including those that have elected minority representatives, could be significantly diluted.

132. Reynolds v. Sims, 377 U.S. 565-66 (1964) ("[R]epresentative government is in essence self-government through the medium of elected representatives of the people. . . . [W]e concluded that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators").

133. Wells v. Edwards, 347 F. Supp. 453, 456 (M.D. La. 1972) (citing New York State Ass'n of Trial Lawyers v. Rockefeller, 267 F. Supp. 148, 153 (S.D.N.Y. 1967)).

134. *See New York State Ass'n of Trial Lawyers*, 267 F. Supp. at 153-54. *See also* Holhouser v. Scott, 335 F. Supp. 928, 932 (M.D.N.C. 1971); Buchanan v. Rhodes, 249 F. Supp. 860, 865 (N.D. Ohio 1962). It is instructive to note that the early cases of *New York Trial Lawyers* and *Buchanan* actually were brought to address the inequities in the administration of justice in urban and suburban areas of New York and Ohio resulting from chronic delays and backlogs of cases. Plaintiffs were not seeking to reapportion the judicial electoral districts to ensure that their candidates were elected. Rather, the minority citizens sought a re-assignment of judges based on population to remedy the delays they faced in the judicial system.

135. *Holhouser*, 335 F. Supp. at 929, 934.

136. 914 F.2d at 622.

sentatives" if their election is required—is flawed. Under such logic, section 2 of the Act should also exempt numerous other government officials such as elected school board members,[137] elected administrative commissioners,[138] or even governors[139] who, like judges, "need not be elected at all." But *LULAC I* notwithstanding, the criterion for application of section 2 of the Act is not whether the government official *must* be elected. Rather, the criterion is whether she *is* elected—and if she is, she must be elected in a manner open to minority voters.

It has been argued that the *Wells* "judiciary exception" to the one-person one-vote principle is anomalous to voting rights doctrine.[140] Irrespective of its merits, *Wells* is not controlling, and the federal courts have generally recognized the prima facie distinction between *Wells* and cases involving racial discrimination in judicial elections. For example, in *Voter Information Project v. Baton Rouge* (*"VIP"*), the Fifth Circuit reversed a district court ruling that a challenge to Baton Rouge's election of its three municipal judges did not state an actionable claim.[141] In *VIP*, the Fifth Circuit acknowledged that *Wells* precluded a claim under the doctrine of one-person one-vote, but stated that an at-large judicial system was vulnerable on either fourteenth or fifteenth amendment grounds

137. The Court has held that districts for the election of school board members can be malapportioned in violation of the Act. *See* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). *See also* Hadley v. Junior College Dist., 397 U.S. 50 (1970). *Hadley* was an apportionment case involving the election of trustees to the Kansas Junior College District Board of Education. The Court held that even though a state may opt not to elect certain officials, if the state or local government decides to select these persons by popular election, they must be elected in accord with the provisions of the fourteenth amendment. *Accord* Sailors v. Board of Educ., 387 U.S. 105, 109 (1967). In *Sailors*, the Court upheld the right of a Michigan locality to not select its Board of Education members by popular election. However, in dictum, the Court confirmed the view that if such elections were held, they must be done in accord with the Constitutional requirements of *Baker v. Carr* and *Reynolds v. Sims*. It appears, therefore, that prior to *Wells*, the Court was implicitly extending the one-person one-vote principle to all elections. The main point here, however, is that the voting rights principles upon which section 2 is based apply to elections for all government officials, even where appointment is a lawful alternative method of selection.

138. *See, e.g.*, Dillard v. Crenshaw County, 831 F.2d 246 (11th Cir. 1987). *Dillard* held that the administrative functions of a newly-created county chairperson did not determine whether the post must be elected or appointed. However, once the post is open to the electorate, the election must be conducted in a way that does not deny access to minority voters. *Id.* at 251.

139. *See* Fortson v. Morris, 385 U.S. 231 (1967). The Court refused to apply the one-person one-vote principle to a Georgia procedure that permitted the state assembly to elect the Governor from the two top vote-getters in the general election when neither received a majority of the vote.

140. *See* Note, *Casting a Meaningful Ballot: Applying One-Person, One-Vote to Judicial Elections Involving Racial Discrimination*, 98 YALE L.J. 1193, 1204, 1208 (1989). The author proposed that courts should extend the one-person one-vote standard to judicial elections for two key reasons. First, exemption from one-person one-vote considerations could be used to deny expeditious administration of justice in minority communities that often have higher crime rates. Second, the exemption is a potential means to circumvent the requirements of the Voting Rights Act (assuming that the Court extends the provisions of the Act to judicial elections).

141. Voter Information Project v. Baton Rouge, 612 F.2d 208, 210 (5th Cir. 1980) [*"VIP"*], (cited in *LULAC I*, 902 F.2d at 302).

if it operated against racial minorities.[142] Even in cases prior to *Wells* that articulated the judicial exception to the one-person one-vote principle, the courts recognized that "discrimination among voters" based on "invidious action or distinction between citizens" would be prohibited in judicial elections.[143]

In contrast to the exemption of judicial elections from one-person one-vote considerations, no government election escapes constitutional scrutiny from the concerns evinced in the Civil War amendments. Claims grounded in the doctrine of minority vote dilution "do not deal with numerical apportionment, but with [racial] discrimination."[144] In *Whitcomb v. Chavis*, the Supreme Court recognized that minority vote dilution claims had validity where the at-large district cancels out the votes of racial minorities.[145] The concurring opinion of Justice Douglas further articulated the unique constitutional mandate of the Civil War amendments to eradicate racial discrimination, particularly in voting:

> It is said that if we prevent racial gerrymandering today, we must prevent gerrymandering of any special interest group tomorrow, whether it be social, economic, or ideological. I do not agree. Our Constitution has a special thrust when it comes to voting; the Fifteenth Amendment says the right of citizens to vote shall not be "abridged" on account of "race, color, or previous condition of servitude."[146]

As the Supreme Court held in *Gingles*, the heart of a voting rights claim is not simply the lack of minority representation or even the existence of potentially discriminatory procedures such as multi-member districts.[147] Rather, the essence of the claim under the amended Act is the third and final threshold requirement articulated in *Gingles*, that the challenged electoral procedure combines with white racial bloc voting, usually resulting in the defeat of the candidates preferred by minority voters.[148]

142. *VIP*, 612 F.2d at 210. This same view was expressed in *Lefkovits v. State Board of Elections*, where the Supreme Court affirmed an Illinois district court ruling which stated that: "[W]hen a judge is to be elected or retained, regardless of the scheme of apportionment, the equal protection clause requires that every qualified elector be given an equal opportunity to vote and have his vote counted." 400 F. Supp. 1005, 1012 (N.D. Ill. 1975), *aff'd mem.*, 424 U.S. 901 (1976) (quoted by *LULAC I*, 902 F.2d 293, 302 n.4 (5th Cir. 1990) (panel ruling)).

143. *See* Buchanan v. Rhodes, 249 F. Supp. 860, 864 (N.D. Ohio 1966) ("[I]f plaintiffs have accurately framed a cause of action based upon the Equal Protection Clause they are entitled to go forward."). *Accord Lefkovits*, 400 F. Supp. at 1012; Holhouser v. Scott, 335 F. Supp. 928, 932-33 (M.D.N.C. 1971).

144. *LULAC I*, 902 F.2d at 302.

145. 403 U.S. 124, 143 (1971).

146. *Id.* at 178. (Douglas, J., concurring).

147. Thornburg v. Gingles, 478 U.S. 30, 46-49 (1986).

148. In *Gingles*, the Court summarized its holding that racial discrimination is central to claims under the Act: "Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Id.* at 48-49 (emphasis

The threshold prerequisites adopted in *Gingles* were critical in *Williams v. State Board of Elections*, an Illinois challenge by African-American and Hispanic plaintiffs to the at-large procedure of electing judges.[149] The plaintiffs in *Williams* sought to establish single-member districts for the election of judges to the circuit and appellate courts in Cook County and to three county spots on the Illinois Supreme Court. Alleging that the at-large system diluted their voting strength, plaintiffs provided strong statistical evidence that they were inequitably represented on the state bench.[150] Nonetheless, the district court found that plaintiffs failed to conclusively demonstrate that white racial bloc voting within the at-large system was responsible for plaintiffs' failure to elect minority judges.[151] This deficiency automatically defeated plaintiffs' claim that the at-large procedure caused minority vote dilution.[152] *Williams* demonstrates that an actionable claim of minority vote dilution, in contrast to malapportionment, must be based upon proof of *racial* discrimination in the election process.

The distinction between minority vote dilution and the one-man one-vote principle, then, is critical.[153] The majority en banc opinion in

in original). The Court further noted: "Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates." *Id.* at 48-49 n.15.

The Senate Report accompanying the 1982 amendments to the Act stated that the correct inquiry (considering the purpose of the Act and the doctrine of minority vote dilution) is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the electoral process and to elect candidates of their choice." S. Rep. No. 417, 97th Cong., 2d Sess. 28, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 417 (cited in *Gingles*, 478 U.S. at 44). *See also* South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).

149. 718 F. Supp. 1324 (N.D. Ill. 1989). Notably, the court's ruling failed to even discuss the applicability of section 2 to judicial elections, a tacit acceptance of Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988) and Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988) in what it considered to be an emerging consensus that section 2 claims reached judicial elections.

150. In Cook County, African-Americans would constitute a majority in a Supreme Court single-member district, yet it was not until the November, 1990 election of Charles Freeman that an African-American was elected to the court. According to 1980 census figures, African-Americans constituted approximately 25% of the Cook County population, yet only 21 of the 177 circuit court judges, or 11.8%, were African-American. *See* Williams v. State Bd. of Elections, 696 F. Supp. 1563, 1565 (N.D. Ill. 1988). With Hispanics, the figures revealed even greater inequities. Hispanics could constitute a majority in a single-member appellate court district, yet no Hispanic had ever been elected to the appellate level. And despite the fact that Hispanics constituted approximately 10% of the county population, only 1 out of 177, or 0.5% of circuit court judges were Hispanic. *Id.*

151. *Williams*, 718 F. Supp. at 1328-29.

152. *Id.*

153. *See Zimmer v. McKeithen*, where the Fifth Circuit stated that:

> Both the Supreme Court and this court have long differentiated between these two propositions. And although population is the proper measure of equality in apportionment, in Whitcomb v. Chavis, 403 U.S. 124, 149-150 . . . and White v. Regester, *supra*, 412 U.S. at 765 . . . the Supreme Court announced that access to the political process and not population was the barometer of dilution of minority voting strength.

485 F.2d 1297, 1303 (5th Cir. 1973) (footnote omitted).

LULAC I asserted that both concepts rested on the same notion of "substantial equality."[154] However, the equation of the two doctrines reflects a misunderstanding of the main concern and objective of voting rights doctrine of the last twenty-five years: namely, the eradication of racial discrimination in our nation's electoral procedures.[155] The *Wells* exception to the one-person one-vote principle rests upon the constitutional discretion of the states to apportion and select their state judges however they wish. In contrast, no constitutional discretion is afforded to the states to deny equal access for minority voters to the electoral process, regardless of who or what is on the ballot.

C. *Congressional Intent: Were Judges Covered in the 1982 Amendments?*

Since Congress intended to eradicate all racial discrimination in voting when it passed the Act in 1965 and amended it in 1982, section 2 should apply to judicial electoral procedures. The Act empowered the federal government to substantially intrude into state electoral procedures, areas of concern that traditionally were exclusively reserved for the states. Moreover, two seminal Voting Rights Act cases of the 1960's—*South Carolina v. Katzenbach*[156] and *Allen v. State Board of Elections*[157]—upheld the constitutionality of the Act and the sweeping federal powers it established to finally make the promise of the fifteenth amendment a reality for minority voters.[158]

The Court's expansive interpretation of the scope of the Act in *Katzenbach* and *Allen* influenced the Sixth Circuit in *Mallory v. Eyrich*.[159] In *Mallory*, the court held that a challenge by minority voters to Cincinnati's municipal at-large judicial elections stated an actionable claim under section 2 of the Act.[160] The court was impressed by the fact that both *Katzenbach* and *Allen* gave "no hint that any state or local election, whatever the office involved, is exempted from coverage of the 1965 Act."[161] In *Allen*, then Chief Justice Earl Warren took notice of congressional intent to give the Act its broadest possible coverage by reprinting

154. 914 F.2d 620, 628 (5th Cir. 1990).

155. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966); Thornburg v. Gingles, 478 U.S. 30, 43 (1986).

156. 383 U.S. 301 (1966).

157. 393 U.S. 544 (1969).

158. *See Katzenbach*, 383 U.S. at 308; *Allen*, 393 U.S. at 556 (quoting *Katzenbach*: "The Act was drafted to make the guarantees of the Fifteenth Amendment finally a reality for all citizens.").

159. 839 F.2d 275 (6th Cir. 1988).

160. *Id.* at 282.

161. *Id.* at 278. *See also* Southern Christian Leadership Conference v. Siegelman, 714 F. Supp. 511, 515 (M.D. Ala. 1989) (quoting *Mallory*, 839 F.2d at 278).

the Senate testimony of Attorney General Nicholas Katzenbach.[162] The Attorney General had vehemently and successfully encouraged Congress to expand the protective scope of section 2 from the original word "procedure" to any "voting qualifications or prerequisite to voting, or standard, practice, or procedure."[163]

Underscoring this comprehensive intent of Congress is section 14(c)(1) of the Act, which defines "vote" and "voting" for purposes of the Act and outlines the types of practices and elections that are embraced by the Act's regulatory provisions. Section 14(c)(1) states in total:

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special or general election, including, but not limited to registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to *candidates for public or party office* and propositions for which votes are received in an election.[164]

The federal courts, prior to *LULAC II* have been heavily influenced by section 14, holding that the words "candidate for public or party office" definitely include judicial candidates.[165] Moreover, the fact that the Act extended even to ballot propositions lends credence to the claim that the Act reached any type of election, regardless of who or what was on the ballot.[166] A final point supporting an expansive interpretation of the sweep of the Act is the assertion that section 2 of the Act was essentially designed to achieve the guarantees of the fifteenth amendment, which applied to all elections. Given that the Court in *Bolden* equated the Act with the fifteenth amendment,[167] Congress never would have intended to

162. *Allen*, 393 U.S. at 567-68.

163. *Id. See also* Brooks v. State Bd. of Elections, No. 288-146 (S.D. Ga. Dec. 14, 1989) (LEXIS, Genfed library, Dist file), *aff'd*, 111 S. Ct. 13 (1990). *Brooks* involved a challenge under the preclearance provisions of section 5 to 77 at-large judgeships created since the passage of the Act. The district court was strongly influenced by the Supreme Court's statement in *Allen*: "[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered state in even a minor way." *Brooks*, No. 288-146, (LEXIS at *11) (quoting *Allen*, 393 U.S. at 566).

164. Voting Rights Act of 1965, Section 14(c)(1), 79 Stat. 445 (1965) (codified at 42 U.S.C. § 1973l(c)(1) (1988)) (emphasis added).

165. *See* Chisom v. Edwards, 839 F.2d 1056, 1059-60 (5th Cir. 1988) ("Clearly, judges are 'candidates for public or party office' elected in a primary, special, or general election . . . ."); *Mallory*, 839 F.2d at 278 ("Candidates for elective judicial positions are unquestionably 'candidates for public . . . office.' "); *Southern Christian Leadership Conference*, 714 F. Supp. at 515 ("Clearly, aspirants for elective judicial positions are 'candidates for public or party office.' ").

166. Section 14(c)(1) weighed heavily on the Fifth Circuit in *Chisom*. The court stated that "[e]vidence of congressional intent to reach all types of elections, regardless of who or what is the object of the vote, is the fact that votes on *propositions* are within the purview of the Act. Section 14(c)(1)." 839 F.2d at 1060 n.1 (emphasis in original).

167. *LULAC I*, 902 F.2d 293, 298 (5th Cir. 1990). *See* City of Mobile v. Bolden, 446 U.S. 55, 60-61 (1980). The Court held that the Act merely intended to provide the same protections as the

exempt literacy tests, poll taxes, and other registration requirements from the Act's prohibitions simply because the candidates on the ballot were judicial aspirants. In fact, the majority in *LULAC II* admitted that the Constitution protected minority voters against purposeful voting rights violations in judicial elections.[168]

The *LULAC II* majority reasoned that Congress presumably knew, when it amended section 2 of the Act in 1982, that the term "representative" had been interpreted by the Supreme Court to exclude the judiciary.[169] In fact, the *LULAC II* majority cited fifteen other federal cases decided prior to 1982 that followed the holding in *Wells* that the judiciary was excluded from the one-person one-vote principle.[170] Thus, the *LULAC II* majority reasoned that Congress was fully aware of *Wells*: if it had wanted to extend coverage to judicial elections, it could have so provided.[171]

The *LULAC II* majority analysis was based on several additional contentions. First, the main purpose of the 1982 amendments was to repudiate the *Bolden* "discriminatory intent test" and enact the *White* "results test."[172] Second, although Congress took much of its terminology directly from *White*, it changed *White*'s terminology of "legislator" to "representative" in section 2(b) in order to expand the coverage of the "results test" to include the executive branch.[173] Third, by substituting

fifteenth amendment which were never realized: "it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes it clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." *Id.*

168. 914 F.2d 620, 622 (5th Cir. 1990) ("[T]he language of the 1982 amendment is clear and that it extends the Congressional non-Constitutional 'results' test for vote dilution claims no further than the legislative and executive branches, leaving the underlying, Constitutional 'intent' test in place as to all three."). In other words, both the original Act of 1965 and the fifteenth amendment extended to judicial elections.

169. 914 F.2d at 622-23.

170. *See LULAC II*, 914 F.2d at 626 n.9 (citing Sagan v. Pennsylvania, 542 F. Supp. 880 (W.D. Pa. 1982), *appeal dismissed*, 714 F.2d 124 (3d Cir. 1983); Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy Dist., 473 F. Supp. 334 (S.D. Ohio 1977); Ripon Society, Inc. v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976); Fahey v. Darigan, 405 F. Supp. 1386 (D.R.I. 1975); Gilday v. Board of Elections, 472 F.2d 214 (6th Cir. 1972); Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973); Buchanan v. Gilligan, 349 F. Supp. 569 (N.D. Ohio 1972); Holhouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd mem.*, 409 U.S. 807 (1972); Sullivan v. Alabama State Bar, 295 F. Supp. 1216 (M.D. Ala.), *aff'd*, 394 U.S. 812 (1969) (per curiam); Irish v. Democratic-Farmer-Labor Party, 287 F. Supp. 794 (D.C. Minn.), *aff'd*, 399 F.2d 119 (8th Cir. 1968); Buchanan v. Rhodes, 249 F. Supp. 860 (N.D. Ohio 1966), *appeal dismissed*, 385 U.S. 3 (1966), *vacated*, 400 F.2d 882 (6th Cir. 1968), *cert. denied*, 393 U.S. 839 (1968); New York State Ass'n of Trial Lawyers v. Rockefeller, 267 F. Supp. 148 (S.D.N.Y. 1967); Kail v. Rockefeller, 275 F. Supp. 937 (E.D.N.Y. 1967); Romiti v. Kerner, 256 F. Supp. 35 (N.D. Ill. 1966); Stokes v. Fortson, 234 F. Supp. 575 (N.D. Ga. 1964)).

171. *LULAC II*, 914 F.2d 620, 623 (5th Cir. 1990) (en banc).

172. *See supra* notes 56-59 and accompanying text.

173. *LULAC II*, 914 F.2d at 622-23.

the word "representative," Congress selected a term whose plain meaning placed judges outside the ambit of section 2.[174] Therefore, the 1982 amendments to strengthen the Act actually reflected Congressional legislative intent to supplant the *Bolden* "intent" requirement only for elections involving the legislative and executive branch. Thus, the *LULAC II* majority concluded that the intent requirement of *Bolden* remained intact for judicial elections.[175]

The reasoning of *LULAC II* is not persuasive. No evidence indicates that Congress created a new cause of action when it passed the 1982 amendments. The results test applied to judicial elections prior to *Bolden*. When the amendments legislatively overruled *Bolden*, the "results" test and its antidilution provisions were re-enacted.[176] Unquestionably, there was a wide-ranging intent in the original 1965 Act to reach racial discrimination wherever it existed in voting procedures. Congressional intent in the amended section 2(b) was not to limit the scope of section 2 as first enacted in 1965. The *LULAC II* majority's strongest argument is that Congress was aware of *Wells* and the judicial consensus that judges were not "representatives" under the one-person one-vote doctrine. However, there is no evidence that Congress intended to limit the scope of the Act based on who or what was on the ballot. Indeed, the Senate Report for the 1982 amendments is replete with various references to "candidates,"[177] "elected officials,"[178] and even "judicial districts"[179] in defining the scope of the amended section 2. The

174. *Id.*

175. *Id.*

176. *LULAC II*, 914 F.2d at 638 (Higginbotham, J., concurring).

177. "[T]he election of a few minority *candidates* does not 'necessarily foreclose the possibility of dilution of the black vote' in violation of this section." S. REP. NO. 417, 97th Cong., 2d Sess. 30 n.115 (quoting Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1973)) (emphasis added), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 207; "equal opportunity to participate and to elect *candidates* of their choice . . . ." S. REP. NO. 417, 97th Cong., 2d Sess. 29 (emphasis added), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 207 (cited in *Mallory*, 839 F.2d at 279-80).

178. "Additional factors that in some cases have had probative value as part of plaintiff's evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of *elected officials* to the particularized needs of the members of the minority group." S. REP. NO. 417, 97th Cong., 2d Sess. 30 (footnote omitted) (emphasis added), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 207.

See also Chisom v. Edwards, 839 F.2d 1056, 1063 (5th Cir. 1988) ("Finally, throughout the Senate Report on the 1982 amendments to Section 2, Congress uses the terms 'officials', 'candidates', and 'representatives' interchangeably when explaining the meaning and purpose of the Act. This lack of any consistent use of the term 'representatives' indicates that Congress did not intentionally choose that term in an effort to exclude certain types of elected officials from the coverage of the Act.")

179. Senator Hatch, who opposed the amendments, stated that the "term 'political subdivision' encompasses *all* [emphasis in original] governmental units, including city and county councils, school boards, *judicial districts* [emphasis added], utility districts, as well as state legislatures." S. REP. NO. 417, 97th Cong., 2d Sess. 151, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 323-

consistent use of these terms, coupled with the broad reach of the 1965 Act, demonstrates that the intent of Congress was not to limit, but rather to bring the sweeping coverage of the original Act under the protective coverage of the "results test" of *White*.

D. Are Judges "Representatives"?: The Debate Over the Role of the Judiciary

One recurring theme in the debate over the applicability of section 2 to the state judiciary revolves around a fundamental issue of jurisprudence: the proper role of the judiciary.[180] Historically, this issue has stimulated the intellects of our greatest jurists. However, within the narrow debate over the applicability of section 2 to the judiciary, the analyses have not adequately drawn upon this reservoir of jurisprudential theory.

On one level, whether judges are "representatives" should be technically superfluous because the function of an elective office is irrelevant to a claim of racial discrimination in voting under the Act.[181] But, in addition to its irrelevancy, the *LULAC II* holding that judges are not "representatives" is also disputable on its face. A realist perspective recognizes the dual characteristics of the judiciary: the public wants judges to be independent and impartial, but also seeks judges that are accountable to citizens and sensitive to the impact of judicial decisions on society.[182] Although tension exists in judicial performance of these twin roles, they are not inherently contradictory. Both functions emanate from a concern to safeguard the integrity and authority of the democratic political process. The *LULAC II* majority advanced the traditional view[183] that the concept of a judge is antithetical to the role of a "representative," *i.e.*, judges have no constituents, but instead represent only the law.[184] Fur-

24 (cited in *Chisom*, 839 F.2d at 1062, *LULAC I*, 902 F.2d at 299, and Brooks v. State Bd. Elections, No. 288-146 (LEXIS at *12)).

180. A caveat is necessary: given the complexity of this jurisprudential issue, an in-depth analysis of the different theories concerning the role of the judiciary is beyond the scope of this Note.

181. *See supra* notes 140-46 and accompanying text.

182. *See* Canon, *Commentary on State Selection of Judges*, 77 KY. L.J. 747 (1988-89).

183. *See, e.g.*, Stephens, *Commentary on State Selection of Judges*, 77 KY. L.J. 741 (1988-89). The author, Chief Justice of the Supreme Court of Kentucky, captured the essence of this traditional view of the judiciary:

> [S]hould judges be responsible in their decisions to the public? I feel very strongly that the answer to this question is no. . . . My own view, however corny or idealistic it may be, is that a judge's job is to be objective and to interpret the constitution and the statutes the best way possible, by using precedent. . . . If judges are to be directly responsible to the public, then the judicial system ought to be abolished and every time an issue comes up just have a vote on whether X should be convicted or whether this decision should be made.

Id.

184. *LULAC II*, 914 F.2d at 625-26.

thermore, the Fifth Circuit in *LULAC II* stated that judges can never advocate or represent a segment of the community: "insofar as a judge *does* represent anyone, he is not a judge but a partisan."[185] This theory, also advanced by the district courts in *Mallory v. Eyrich*[186] and *Chisom v. Edwards*,[187] asserts that judges are not "representatives" because their most valued quality "is the ability to withstand the pressures of public opinion in order to ensure the primacy of the rule of law over the fluctuating politics of the hour."[188] A named defendant in a companion case to *LULAC II* to be heard by the Supreme Court this spring, Governor Buddy Roemer of Louisiana colorfully argued that representatives "have a constituency which numbers in the hundreds to hundreds of thousands, to each of whom they owe fidelity . . . . Judges have but one constituency, the blindfolded lady with the scales and sword."[189]

The proponents of section 2 coverage of judicial elections have not adequately responded to this obsolete definition of the judiciary. The only substantive response has been that expressed in the *LULAC II* concurring opinion which maintained that judges do have a certain "representative" role.[190] The concurrence stated that the decision to elect judges, rather than to appoint them, reflects a concern to keep judges responsive to and sensitive to the changing concerns of the people.[191] This concern inspired the movement towards elected state judiciaries during the Jacksonian democratic movement of the 1830s and 1840s to bring government closer to the people.[192] The concurring opinion conceded that judges are neither actors in the political give-and-take processes of the legislative or executive branches, nor advocates for a particular constituency. Instead, the concurrence was motivated by the fact that judges are frequently called upon to make common law decisions, such as determining negligence standards and deciding cases that

185. *Id.* at 628 (emphasis in original).

186. 666 F. Supp. 1060 (S.D. Ohio 1987), *rev'd*, 839 F.2d 575 (6th Cir. 1988). The district court stated: "Blacks Law Dictionary has pointed out that judges, by definition, do not represent voters, but are 'appointed or elected to preside and administer the law.' " *Id.* at 1062.

187. 659 F. Supp. 183 (E.D. La. 1987), *rev'd*, 839 F.2d 1056 (5th Cir. 1988). The district court stated that "judges, by their very definition, do not represent voters." *Id.* at 186. The district court then quoted *Black's Law Dictionary* for the proposition that judges are "appointed or elected to preside and administer the law." *Id.* (citing BLACK'S LAW DICTIONARY (4th ed. 1968)).

188. *LULAC II*, 914 F.2d at 626 (quoting Hickok, *Judicial Selection: The Political Roots of Advice and Consent* in JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 4 (National Legal Center for the Public Interest 1990).

189. Marcus, *Supreme Court to Determine If Judges' Elections are Biased; Minorities Challenge Voting Rights Act Provision*, Wash. Post, Jan. 19, 1991, at A2 (quoting the brief filed by Governor Buddy Roemer to the United States Supreme Court in Clark v. Roemer, No. 90-952).

190. 914 F.2d at 635-36 (Higginbotham, J., concurring).

191. *Id.* at 635.

192. *Id.*

materially affect the people of their state.[193] The history of state judicial elections supports the analysis of the concurrence. Although none of the original thirteen states that entered the union elected their judges, every state that entered the union after 1846 selected at least some of their judiciary by popular election.[194] The trend towards judicial elections was part of a democratic impulse to guarantee that the judiciary retained some representative nexus with the electorate.[195] The decision to elect judges is a choice left to the states, and today thirty-one choose to elect some part of their state judiciary.[196]

Those who now contend that judges cannot be considered "representatives" remain wedded to a dated formalist philosophy of jurisprudence. Eighteenth century American jurisprudence viewed the judge as an objective figure who dispassionately applied clearly delineated rules of law to specific fact scenarios.[197] In contrast, what has been referred to as a "formative era" or "golden age" emerged in the post-revolutionary period, when American judges began to develop the law as a creative instrument to free the country from "precommercial and antidevelopmental legal doctrines" that hindered the economic and political growth of the nation.[198] However, the rise of legal formalism emerged in the mid-1800s to solidify the judicial process as an apolitical and rational application of existing statutes and common law rules.[199] With its reliance on legal precedent and doctrine, its search for "the true rule," and its objectives of legal certainty and predictability, formalism became the dominant view in American jurisprudence.[200] This philosophy was well-summarized by Max Weber who applied formalism to modern law:

> (1) Every decision of a concrete case consists in the application of an abstract rule of law to a concrete fact situation.

193. *Id.* at 636.

194. L. FRIEDMAN, *supra* note 16, at 323.

195. *See id.* Friedman quoted J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 140 (1950) in stating that the movement toward an elected judiciary was "one phase of the general swing toward broadened suffrage and broader popular control of public office which Jacksonian Democracy built on the foundations laid by Jefferson." L. FRIEDMAN, *supra* note 16, at 323.

196. *See infra* notes 262-68.

197. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1-30 (1977). Horwitz pointed out that "American judges before the nineteenth century rarely analyzed common-law rules functionally or purposively, and they almost never self-consciously employed the common law as a creative instrument for directing men's energies toward social change." *Id.* at 1.

198. *Id.* at 1, 253-59 (citing R. POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938) and R. POUND, THE GOLDEN AGE OF AMERICAN LAW (1965)).

199. M. HORWITZ, *supra* note 197, at 257. Horwitz contends that the rise of formalism originated in the desire to separate law and politics, in order to give law the appearance that it was above politics and to preserve existing political and economic relations.

200. *See generally* K. LLEWELLYN, THE COMMON LAW TRADITION (1960). *See also* L.L. HAMPSTEAD, INTRODUCTION TO JURISPRUDENCE 399 (3d ed. 1972).

(2) By means of legal logic abstract rules of positive law can be made to yield a decision for every concrete fact situation.
(3) Positive law constitutes a "gapless" system of rules or must at least be treated as if it were such a system.
(4) Every instance of social conduct can and must be conceived as constituting either obedience to, or violation, of rules of law.[201]

However, American jurisprudence was greatly influenced by the pragmatic emphasis of Oliver Wendell Holmes, who posited that the life of the law was experience.[202] Holmes laid a foundation for the legal realists in the 1920s and 1930s who destroyed the notion that the role of the judiciary was limited to the mechanical application of pre-existing rules. Jurists such as Benjamin Cardozo[203] and Jerome Frank[204] discredited the idea that the singular duty of the judge is to determine how a law or rule conformed to existing doctrine.[205] The realists consistently questioned the use of legal traditions and rules, whenever such doctrine obstructed the administration of justice. They viewed the law as a working social tool, equitably forged "on the basis of the daily grist," rather than a string of citations and treatises linked by a deductive reasoning process.[206] The notion that judges do more than apply existing rules also places judges closer to social realities. The fact that judges must adapt and base their decisions on the existing problems and concerns of citizens precludes a judicial role totally independent of "representative" concerns. In this sense, judges are similar to legislators and other representative officials who act in the interests of their constituents.

Formalist philosophy guides those today who decline to recognize the "representative" features of the judicial role. The exemption of judges from section 2 of the Act rests on an artificial, formalist distinction between judges who interpret laws and other government "repre-

201. M. WEBER, LAW AND ECONOMY IN SOCIETY 64 (M. Rheinstein ed. 1954) (cited in L.L. HAMPSTEAD, *supra* note 200).

202. L.L. HAMPSTEAD, *supra* note 200 at 402.

203. *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). For a modern view that dispassionate impartiality and disengagement is impossible in the judicial process, see Resnik, *On The Bias: Feminist Reconsiderations of the Aspirations For Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

204. *See* J. FRANK, LAW AND THE MODERN MIND (1930).

205. *See generally* K. LLEWELLYN, *supra* note 200.

> And the consequent 'certainty' of outcome is the truest certainty legal work can have, a certainty reached not by deduction but by dynamics, moving in step with human need yet along and out of the lines laid out by history of the Law and of the culture; the certainty, then, not of logical conclusion from a static *universal*, but of that *reasonable regularity* which is law's proper interplay with life.

Id. at 186 (emphasis in original). *See also* L.L. HAMPSTEAD, *supra* note 200, at 403. *See also* Adamany, *The Party Variable in Judges' Voting: Conceptual Notes and a Case Study*, 63 AM. POL. SCI. REV. 57 (1969).

206. K. LLEWELLYN, *supra* note 200, at 394-95.

sentatives" who enact and carry out the laws. Where legal formalism denied the creative, fact-oriented role of the judiciary, the current formalist view denies the principal similarities between the judiciary and other government officials. For example, both judges and legislators are selected by the people to decide important issues and to establish fair rules of law to govern society. Both types of government officials advance the legitimate interests and concerns of citizens in accord with generally-held norms of fairness and equity.

Moreover, the judiciary probably performs a greater representative role in the scheme of government than many elective offices to the executive branch. For example, sheriffs, tax assessors, chief prosecuting attorneys, and other "apolitical" posts are elected in many jurisdictions. These types of officials, like judges, are prohibited from exercising the duties of their office in a partisan manner. Just as judges must impartially interpret and apply the law, these executive officials are charged above all with the duty to fairly and impartially execute the law. Yet, such executive officials are considered "representatives." Recognition of these similarities does not impugn the impartial or independent character of the judicial branch of government. It merely recognizes that important public officials who exercise discretionary authority in the performance of government duties are, in fact, "representatives" of the community they serve.

The legal realists further acknowledged that attitudes and values of judges are often factors that affect their views of the issues before them for resolution.[207] Numerous empirical studies have demonstrated that judges do interact with the public and seek to reflect and represent particular legal perspectives as a function of the American political system.[208] These studies of the adjudicatory process of state judiciaries reveal that party affiliations, social backgrounds, and personal experience are factors in judicial decisionmaking. One study, for example, demonstrated that in a sample of 298 judges, Democratic judges were more prone than Republican judges to consistently favor the following parties: 1) the defense in criminal cases; 2) an administrative agency in business regulation cases; 3) the private party in cases involving regulation of nonbusiness entities; 4) the claimant in unemployment cases; 5) the libertarian position in free speech cases; 6) the finding of a constitutional

207. *See* L.L. HAMPSTEAD, *supra* note 200, at 405. *See also* P. DUBOIS, FROM BALLOT TO BENCH 145 (1980).

208. *See generally* P. DUBOIS, *supra* note 207. *See also* Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551 (1966); Adamany, *supra* note 205; Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961).

violation in criminal cases; 7) the government in tax cases; 8) the divorce seeker in divorce cases; 9) the tenant in tenant-landlord disputes; 10) labor in labor-management disputes; 11) the debtor in debtor-creditor disputes; 12) the consumer in sales cases; 13) the injured party in car accident cases; and 14) the employee in employee injury cases.[209] Similarly, a study of the Michigan Supreme Court found that Democratic judges were more favorably inclined towards the injured party in worker's compensation cases.[210] Other studies have established that the greater the partisanship in the system of judicial election, the greater the tendency for state supreme court justices to vote along party lines.[211] Additionally, racial make-up and social background is relevant to federal court decisions involving civil rights and civil liberties cases, as demonstrated by a study of the decisions of the United States District Court for the Eastern District of Missouri.[212] The inference to be drawn is not that judges are partisans who rule improperly without concern for the merits of the cases. Rather, the proper conclusion is that judges usually apply and develop the law in accord with their own best sense of fairness and social progress.

Similarly, these studies have revealed that citizens' attitudes are factors that can affect how judges vote on issues that they must confront on the bench.[213] Moreover, where party endorsements are important in judicial election campaigns, a judge often must demonstrate some sensitivity to party allegiance in judicial decision-making between elections.[214] A strong relationship also exists between the political affiliation of the gubernatorial and legislative leadership of a state and the partisan characteristics of the state bench. For example, in states with strong Democratic leadership, 90.6% of the judges on the state supreme courts are Democrats. Although the political control pattern in states with Republican leadership is somewhat mitigated, still only 20.5% of the judges on

209. Nagel, *supra* note 208, at 845. *See also* Grossman, *supra* note 208, at 1556-57.

210. G. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 129-42 (1959) (cited in Grossman, *supra* note 208, at 1557 n.2).

211. *See* P. DUBOIS, *supra* note 207. For example, in Wisconsin, judicial elections are nonpartisan and candidates do not run under a party label. In contrast, Michigan has a strong partisan system, with party labels for candidates on the ballot, vigorous judicial primaries, and strong party organizations. Not surprisingly, Michigan judges were more inclined to support the views generally representative of their party affiliation. *Id.* at 156-62.

212. Public Interest Law Notes, *Civil Rights Enforcement and the Selection of Federal District Court Judges*, 21 ST. LOUIS U.L.J. 385 (1977).

213. *See, e.g.*, P. DUBOIS, *supra* note 207, at 148 (even though voter attention to judicial elections is not high, elections do influence judicial behavior as judges anticipate the concerns and reactions of their constituents); Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491 (1975).

214. P. DUBOIS, *supra* note 207, at 147.

the highest state courts are Democrats.[215]

Judges do not have "representative" characteristics merely because they are elected. Rather, states have chosen to elect judges precisely because they perform a representative function.[216] Although this Note does not advocate any special method of judicial selection, the fact that some judges are appointed does not alter their "representative" characteristics. In fact, empirical studies have illustrated that even the appointed judiciary is a product of the representative political process.[217] Statistical studies demonstrate that appointive systems increase the political leadership's influence over the political affiliation of judges.[218] Governors usually appoint individuals of their own party—well over ninety percent of judicial appointments to the state supreme courts share the political affiliation of the governors.[219] In the federal system, of 216 judges appointed by Presidential administrations from President Lyndon Johnson through President Ronald Reagan, only 3.7% were outside the President's political party.[220] Thus, judicial recruitment, whether of the elected or appointive variety, is highly integrated into the American political system.

Finally, it has been suggested that the legitimacy of the decisions and laws handed down by the judiciary are not built upon an abstract respect the public has for the courts.[221] The judge surely is expected to be an impartial arbiter. However, those judicial decisions that are typical, or representative, of a public consensus will be the ones that are viewed as authoritative and legitimate.[222]

This tension between the judge as an impartial public servant versus the judge as policy-maker was articulated in a recent symposium on judicial selection: "Americans recognize that law and politics cannot be entirely separated. Law is public policy, and public policy is what politics is all about."[223] As the concurrence pointed out in *LULAC II*, judicial creation of policy occurs whenever judges develop common law rules or

215. Atkins, *Judicial Selection in Context: The American and English Experience*, 77 KY. L.J. 577, 585 (1989). *See generally* P. DUBOIS *supra* note 207 at 101-43.

216. *See supra* notes 190-96 and accompanying text.

217. *See* P. DUBOIS, *supra* note 207, at 147; Atkins, *supra* note 215, at 583-87. Although Atkins contends that appointed judges are not "representative" of the population at-large, he provides persuasive arguments that judges, including appointed judges, are products of the political system.

218. Atkins, *supra* note 215, at 585. *See generally* P. DUBOIS, *supra* note 207, at 138-41. *See also* Public Interest Law Notes, *supra* note 212, at 405 n.119.

219. P. DUBOIS, *supra* note 207, at 138-41.

220. Atkins, *supra* note 215, at 585.

221. *See* Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757, 1775 (1988).

222. *Id.*

223. Canon, *supra* note 182, at 747.

interpret statutes and constitutions.[224] Our democratic instincts require that those who formulate such policies "should have some mandate from the people to do this, or in some way be accountable to voters."[225] Clearly, citizens want judges who apply existing rules fairly, such that all litigants play on the same level field. But on the other hand, citizens do not want judges whose unswerving application of such rules results in judicial disdain for and insensitivity for the impact such policies have on society.

The public has expectations that the judiciary will be both independent and representative. The representative characteristics of the judge are demonstrated by the two general fact patterns revealed in the empirical studies cited above: first, judicial decisions (*i.e.*, *what* is decided) are sometimes affected by the political orientation and personal background of the judiciary; and second, the composition of the judiciary, (*i.e.*, *who* serves as a judge) is decided by the political process. An honest appraisal of whether a judge is, in fact, a "representative" must acknowledge the twin roles of judges. Judges are independent arbiters and also sensitive policy-makers. Those that only recognize the "independent" character of judges have ignored a basic political reality of citizen expectations in a democratic society.

E. The Section 5 Argument

Although the voting rights protections of the Act covered the entire country, Congress also enacted special provisions targeted primarily at those states that were most culpable in their denial of minority voting rights.[226] One of these special provisions was section 5, requiring that any state covered by the Act which made any changes in voting procedures, standards, or practice from that which existed prior to November 1, 1964, must first seek "pre-clearance" from the Attorney General before the change can be instituted.[227]

The Supreme Court has now twice affirmed district court holdings that section 5 of the Act applies to judicial elections.[228] In *Haith v. Mar-*

224. *LULAC II*, 914 F.2d 620, 636 (5th Cir. 1990) (Higginbotham, J., concurring).

225. Canon, *supra* note 182, at 747.

226. The primary focus included seven states of the old Confederacy: North Carolina, South Carolina, Georgia, Alabama, Mississippi, Louisiana, and Virginia. *See* South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966); McDonald, *supra* note 18, at 1249.

227. Voting Rights Act of 1965, Section 5, Pub. L. No. 89-110, 79 Stat. 439 (codified as amended at 42 U.S.C. § 1973c (1982)).

228. Brooks v. State Bd. of Elections, No. 288-146 (S.D. Ga. Dec. 14, 1989) (LEXIS, Genfed library, Dist file), *aff'd*, 111 S. Ct. 13 (1990); Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986). *See* Greenhouse, *Supreme Court Roundup: Review of Georgia Judgeships Upheld*, N.Y. Times, Oct. 16, 1990, at 24, col. 1.

tin, a federal district court held that the section 5 pre-clearance provisions Act applied to North Carolina statutes which established a system of numbered seat elections for superior court judges and for additional judges in certain districts.[229] The Supreme Court affirmed the district court ruling without opinion.[230] In *Kirksey v. Allain*, plaintiffs challenged state laws that changed the election procedures for state chancery and circuit court judges.[231] The Mississippi district court followed *Haith* and struck down the new judicial elections on grounds that they violated section 5 of the Act because they were not previously approved by the Attorney General.[232]

In an important recent development, the *Haith* holding that section 5 extends to judicial elections was again followed when the Supreme Court affirmed *Brooks v. State Board of Elections*.[233] In *Brooks*, the Court upheld a Justice Department ruling that nearly half of the judgeships in the Georgia trial courts were invalid under the Act. Forty-eight of seventy-seven superior court judgeships and two of five new circuits created since the passage of the Act had never been pre-cleared according to section 5 provisions.[234]

Plaintiffs who advocate that section 2 should likewise extend to judicial elections point to the nearly identical language of section 2 and section 5 and that the statutes are essentially companion statutes.[235] Every court—except the one in the *LULAC II* en banc opinion—has found it extremely inconsistent to apply similar companion sections of the Act

229. *Haith*, 618 F. Supp. at 411-12.

230. 477 U.S. 901 (1986).

231. 635 F. Supp. 347, 348 (S.D. Miss. 1986).

232. *Id.* at 349-50.

233. Brooks v. State Bd. of Elections, No. 288-146 (S.D. Ga. Dec. 14, 1989) (LEXIS, Genfed Library, Dist file), *aff'd*, 111 S. Ct. 13 (1990); *see* Greenhouse, *supra* note 14.

234. *Brooks*, No. 288-146 (LEXIS at *3).

235. *See LULAC II*, 914 F.2d 620, 643 (5th Cir. 1990) (Higginbotham, J., concurring). The respective sections employ very similar language. For example, the amended section 2(a) states that:

> No *voting qualification or prerequisite to voting or standard, practice, or procedure* shall be imposed or applied by any *State or political subdivision* in a manner which *results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color* . . . .

Voting Rights Act of 1965, 96 Stat. 134 (codified as amended at 42 U.S.C. § 1973 (1988)) (emphasis added).

Section 5 uses virtually identical language:

> Whenever a *State or political subdivision* . . . shall enact or seek to administer any *voting qualification or prerequisite to voting, or standard, practice, or procedure* with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action . . . for a declaratory judgment that such *qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color* . . . .

Voting Rights Act of 1965, Section 5, Pub. L. 89-110, 79 Stat. 439 (codified at 42 U.S.C. § 1973c (1988)) (emphasis added).

differently.[236]

However, the majority in *LULAC II* maintained that because section 5 does not contain the term "representatives," it can be distinguished from section 2.[237] The court reasoned that the purpose of the 1982 amendments was to impose the "results test," but only for elections to the "representative" legislative and executive branches of government. Section 5, which does not use the term "representatives," applies to judicial elections because it is not under the ambit of the "results test" of the amended section 2.[238] Furthermore, the court identified a new category in the amended section 2, stating there was a "non-results test" part of section 2 which protected minority voters from underlying fifteenth amendment protections against purposeful violations of the right-to-vote.[239]

The above argument is seriously flawed. There is not a "non-results test" part of section 2. Section 2(a) imposes the "results test," and section 2(b) further outlines when a violation of 2(a) occurs. Both parts of the section impose the same "results test" if a violation of section 2 is found. *LULAC II*'s odd formulation resulted in a conclusion that section 5 of the Act and the "non-results test" part of section 2 applied to judicial elections, while the "results test" of section 2 did not. Furthermore, section 5 is a companion part of the Act: there is no indication that the two sections cover different elections for governmental offices.

The applicability of section 5 to state judicial elections is a persuasive argument for plaintiffs. The Court's recent affirmance of *Brooks* is strong confirmation that the Act as a whole extends to all electoral procedures. It would be a strange anomaly indeed, if the Supreme Court were to hold that states must obtain approval from the federal government to change procedures for state judicial elections, but that those same states would be exempt from scrutiny for existing discriminatory electoral procedures for state judges because judges are not "representatives." Logically, there exists no rational reason why the scope of the type of electoral procedures covered under section 5 should be any different than section 2.

III. THE SINGLE-OFFICE HOLDER EXCEPTION

Regardless of the *LULAC II* majority's argument that "judges are

236. *See* Chisom v. Edwards, 839 F.2d 1056, 1063-64 (5th Cir. 1988); Mallory v. Eyrich, 839 F.2d 275, 280-81 (6th Cir. 1988); *LULAC II*, 902 F.2d at 301-03.

237. *LULAC II*, 914 F.2d at 629.

238. *Id.* at 629-30.

239. *Id.* at 629.

not representatives,"[240] the long-term significance of *LULAC II* may ultimately be measured by its novel extension of the "single-office holder exception"[241] to elected trial judges. Both the Fifth Circuit panel opinion in *LULAC I* and the concurring opinion in the en banc rehearing in *LULAC II* concluded that trial judges who hear and decide cases individually are "single office-holders," thereby placing trial judges outside the ambit of section 2 protection of the Act.[242] The majority in *LULAC II* failed to reach this issue, ruling for defendants on the more fundamental issue that the entire judiciary is exempt from section 2 of the Act.[243] Nonetheless, even if the U.S. Supreme Court ultimately reverses *LULAC II* (*i.e.*, if the Court ultimately holds that section 2 *does* reach state judicial elections), the single office-holder exception, if upheld, would by itself severely cripple efforts of civil rights litigants to combat minority vote dilution in state judicial elections.

A. Prior Applications of the Single Office-Holder Exception

The single office-holder exception is only applicable when voters elect a government official whose office cannot be shared or divided with other officials. The rationale for the exception is that no remediable minority vote dilution exists because only a single person (*e.g.*, a sheriff, mayor, tax collector, probate judge, etc.) can represent the jurisdiction as an elected official. The exception was first articulated in *Butts v. City of New York*.[244] The plaintiffs in *Butts* were African-American and Hispanic voters in New York City who challenged a new run-off requirement passed by the New York state legislature in the wake of the unusual 1969 New York City Mayoral elections.[245] The new law required a run-off if no candidate received above forty percent of the total primary vote for mayor, comptroller, or city council president.

240. 914 F.2d at 622.

241. *See* Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). *Butts* was the first opinion in which the exception was articulated as a basis to deny the liability of a jurisdiction in a minority vote dilution claim.

242. *LULAC II*, 914 F.2d at 645-51 (Higginbotham, J., concurring); *LULAC I*, 902 F.2d at 303-08 (panel ruling).

243. *LULAC II*, 914 F.2d at 622. Although the majority did not address the single-office holder exception, it shared with the concurring opinion the theoretical view that the focus of the Voting Rights Act depends upon the nature of the office being selected by the minority voter, not on the right of the minority voter to have her vote fully counted. *See id.* at 625-26.

244. 779 F.2d at 149.

245. *Id.* at 143-44. It was generally acknowledged that the run-off requirement was instituted in response to the primary victory of party outsider Mario Proccacino and the surprisingly strong showing of Herman Badillo in the 1969 Democratic Mayoral primary. Badillo, of Puerto Rican descent, received 28% of the Democratic primary vote, only five percentage points behind Proccacino who won with only 33% of the vote.

The Second Circuit did not find probative evidence in *Butts* to support plaintiffs' contention that the new run-off requirement violated the equal protection clause of the fourteenth amendment or section 2 of the Voting Rights Act.[246] The court indicated that even if such evidence existed, there could be no minority vote dilution due to the single-member nature of the city-wide executive offices at stake. Specifically, the court distinguished election to a multi-member body such as a state legislature or city council from election to a single-member office: "a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant" but *"there is no such thing as a 'share' of a single-member office."*[247]

Prior to *LULAC I*, the single office-holder exception was at issue in three cases where minority voters prevailed in claims that at-large schemes to elect local boards of commissioners violated section 2.[248] In all three cases, the district courts struck down the at-large electoral schemes and required that the defendants return to the court with new remedial proposals that did not dilute minority votes. Each defendant jurisdiction responded with a new hybrid plan that included a combination of single-member and at-large elected representatives. In each case, the defendant jurisdiction argued that the proposed at-large representative was lawful because it fell within the single office-holder exception.

In the first of these cases, *Dillard v. Crenshaw County*, the county returned to the district court with a proposal for a six-member county board that included five commissioners elected from single-member dis-

246. The Second Circuit acknowledged that some people labelled the new run-off requirement the "anti-Badillo bill" because it was actually intended to prevent a successful Badillo candidacy in future Mayoral elections. The run-off requirement would prevent a victory for the minority community of New York City if it united behind one candidate while two or more white candidates split the remaining vote of the white majority. (Incidentally, this same phenomenon successfully catapulted Congressman Harold Washington into the Chicago Mayoralty in 1983. Washington's victory also prompted efforts to institute a run-off requirement for Mayoral primaries, which ultimately failed.) In *Butts*, the Second Circuit apparently applied the standard enunciated in City of Mobile v. Bolden, 446 U.S. 55 (1980), that there was not requisite proof that the primary run-off was purposefully designed to discriminate against minority voters and dilute the New York City minority vote. 779 F.2d at 146-49.

247. *Butts*, 779 F.2d at 148 (emphasis added). The only precedent cited by the Second Circuit for this exception was City of Port Arthur v. United States, 459 U.S. 159 (1982). The Second Circuit held that the Supreme Court implicitly applied the single office-holder exception in *Port Arthur* when it struck down a run-off requirement for seats on the City Council but failed to mention any violation for the run-off requirement for Mayor.

248. *See* Buchanan v. City of Jackson, 683 F. Supp. 1537 (W.D. Tenn. 1988); Dillard v. Crenshaw, 649 F. Supp. 289 (M.D. Ala. 1986), *remanded*, 831 F.2d 246 (11th Cir. 1987); United States v. Dallas County Comm'n, 636 F. Supp. 704 (S.D. Ala. 1986), *rev'd and vacated*, 850 F.2d 1430 (11th Cir. 1988) (en banc).

tricts and one chairperson elected at-large.[249] The county claimed that the county chairperson could be elected at-large because he merely performed administrative duties. The Eleventh Circuit, citing *Butts*, acknowledged that single-office holders such as probate judges, tax collectors, and sheriffs fell within the exception and may be elected at-large.[250] Nonetheless, the court found that the county chairperson could not be considered such a single office-holder because he was sufficiently influential over the legislative activities of the county commission as a whole.[251]

The Eleventh Circuit rejected a similar plan in *United States v. Dallas County Commission*, where the county proposed a new five-member commission where four commissioners would be elected from single-member districts and the county probate judge would be elected at-large. The probate judge would serve as a fifth voting member of the board, presiding over board meetings and casting tie-breaking votes.[252] The court again cited *Butts*, acknowledging that the at-large election of a probate judge, as a single office-holder, was permissible.[253] However, without explanation, the court rejected the proposal to allow the probate judge to serve as county chair, simply citing Dallas County's failure to cure the "infirmities" violative of section 2 in the county's electoral system.[254]

Finally, in *Buchanan v. City of Jackson*, a Tennessee district court rejected the city's "6-3" plan to elect six commissioners from single-member districts and three commissioners at-large who would share executive administrative power over city departments.[255] The court here also declined to apply the *Butts* exception to the at-large commissioners. Despite the additional administrative duties of the at-large commissioners, the court stated that their legislative powers remained equivalent to the other six "part-time" District commissioners.[256] Thus, the court held that at-large elections for any commissioners constituted unlawful minority vote dilution.[257]

249. 831 F.2d at 247-48.
250. *Id.* at 251.
251. *Id.* at 251-52.
252. 850 F.2d at 1431-32.
253. *Id.* at 1432 n.1.
254. *Id.* at 1431-42.
255. 683 F. Supp. 1537, 1540 (W.D. Tenn. 1988). The three proposed at-large commissioners were; (1) the Mayor, who would be the city's Executive Officer and Commissioner of the departments of Public Affairs, Revenue, and Public Safety; (2) the Commissioner of the departments of Streets, Health, Sanitation, and Public Improvements; and (3) the Commissioner of Education, Parks, Recreation, and Public Property. *Id.* at 1542.
256. *Id.*
257. The court held that not only would the three at-large commissioners have regular voting

Thus, *Butts* remains the only instance, prior to *LULAC I*, where the single-office holder exception ruled out a minority vote dilution challenge under section 2. The facts of *Butts* were limited to elections for municipal executive posts held exclusively by one official.[258] Subsequent efforts to extend *Butts* to circumstances where local government officials (administrators,[259] probate judges,[260] and executives[261]) simultaneously served on legislative bodies have failed.

B. The Exception That Will Swallow the Rule: The Single Office-Holder Exception Applied to State Judges

The single office-holder exception, applied to state trial judges, would exclude the overwhelming majority of state judges from the protective scope of section 2 of the Voting Rights Act. Statistics demonstrate the far-reaching potential of the single office-holder exception. As of December 1988, counting all 50 states, there were 8,754 state judges serving general jurisdiction courts.[262] Of this total, 338 judges (or 3.9% of the total) sat on state courts of last resort. Seven hundred and ninety-five judges (or 9.1% of the total) served on intermediate appellate level courts. The vast majority, 7,621 judges (or 87.1% of the total) served on the general state trial courts.[263]

Although the individual states employ various combinations of methods to select their judges, these methods all essentially boil down to either elective or appointive systems.[264] The appointive systems include judicial selection by either governors, legislatures, some type of judicial selection commissions, or some combination of all three. These appointive systems often include an uncontested retention election after the judge has held office for a designated period. Eighteen states exclusively

influence over the Board, but that even greater power would shift into their hands because of the discretionary nature of most administrative duties. The exercise of their broad administrative duties would further dilute the influence of the part-time district commissioners, unduly influence the votes of the part-time District commissioners, and decrease the participation of the minority electorate in the political process. *Id.* at 1542-45. One month after the Tennessee district court rejected this scheme, the county submitted a revised plan that included nine council members elected from single-member districts with a mayor elected at-large. This scheme was approved by the district court. *Buchanan*, 683 F. Supp. at 1545.

258. *Butts*, 779 F.2d at 143-44.

259. *See Buchanan*, 683 F. Supp. 1545.

260. *See* United States v. Dallas County Comm'n, 636 F. Supp. 704 (S.D. Ala. 1986), *rev'd and vacated*, 850 F.2d 1430 (11th Cir. 1988) (en banc).

261. *See Dillard*, 831 F.2d 246.

262. Statistics compiled from 28 COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES, Tables 4.1, 4.4 (1990-91).

263. *Id.*

264. For a comprehensive explanation of every state's method of judicial selection and retention, see *id.* at Table 4.4.

use such appointive systems to select their judges.[265] In contrast, twenty states mainly use popular elections with either partisan or non-partisan ballots to select their state judges.[266] The remaining twelve states rely upon some combination of appointments and popular elections to select their state judiciary.[267]

Trial judges constitute a greater percentage of the elected state judiciary than do all the elected and appointed state judges taken together. Of the 8,754 state judges serving general jurisdiction courts, approximately 6,681 (or 76.3%) of such judges are popularly elected.[268] Among this elected state judiciary, there are 6,054 elected trial court judges who constitute 90.6% of the total elected state judiciary. There are only 470 elected state appellate judges and 157 elected state high court judges, representing 7.0% and 2.3% respectively of all elected state judges.[269] Thus, if the single office-holder exception were applied to elected state trial judges, over ninety percent of the state judiciary would be exempt from section 2 of the Voting Rights Act. If the 18,563 judges who serve limited jurisdiction courts (*i.e.*, courts concerned with municipal, family, traffic, or other limited jurisdictions)[270] are also considered, the number of judicial elections excluded from section 2 coverage would further increase to well over ninety-five percent.

C. *Function of the Office vs. Practical Impossibility of Division of the Office*

Whether trial judges are subject to a single office-holder exception turns on a fundamental interpretive issue of the Voting Rights Act. Is the Act designed to ensure full minority participation in all electoral procedures, or is the application of the Act conditional upon the function of the office being selected by the electorate? The terms of this debate are similar to the broader underlying issue, *i.e.*, whether section 2 applies to the judiciary at all. In the broad debate, *LULAC II* exempted all judges from section 2 of the Act based on the judicial function of the office (*i.e.*,

265. These states include Alaska, Colorado, Connecticut, Delaware, Hawaii, Kansas, Maine, Massachusetts, Missouri, Nebraska, New Hampshire, New Jersey, Rhode Island, South Carolina, Utah, Vermont, Virginia, and Wyoming. *See id.* at Table 4.4.

266. Popular elections are mainly used by the following states: Alabama, Arkansas, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, New York, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Washington, West Virginia, and Wisconsin. *See id.*

267. The states that employ both appointive and electoral methods of judicial selection are Arizona, California, Florida, Georgia, Indiana, Iowa, Maryland, New York, North Carolina, Oklahoma, South Dakota, and Tennessee. *See id.*

268. Compiled from statistics in *id.* at Table 4.1.

269. *Id.*

270. *Id.* at 220.

nonrepresentative judiciary vs. representative legislative and executive).[271] Similarly, the inclusion of trial judges in the single office-holder exception to the Act is also based on the function of the elected official, not on the fairness of the electoral procedure for minority voters.

The function of the elective office was the primary issue raised by the defendant counties in *Dillard v. Crenshaw County*,[272] *United States v. Dallas County Commission*,[273] and *Buchanan v. City of Jackson*.[274] In all three cases, defendant jurisdictions argued that the distinction between the legislative and administrative functions of the at-large local commissioners was decisive.[275] Although the courts considered this distinction,[276] the Eleventh Circuit in *Dillard* ultimately discarded the notion that the function of the elective position had any relevance to the applicability of section 2:

> Nowhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 on the function performed by an elected official. . . . Once a post is opened to the electorate, and if it is shown that the context of that election creates a discriminatory but corrigible election practice, it must be open in a way that allows racial groups to participate equally.[277]

Thus, *Dillard* held that the threshold inquiry for a section 2 violation under an at-large electoral system is whether the rights of the voter have been impaired.[278]

Diametrically opposed is the view expressed in the panel ruling in *LULAC I*,[279] the only instance where a federal court applied the *Butts* single office-holder exception to trial judges.[280] The panel began its anal-

271. See *LULAC II*, 914 F.2d at 622: "Characterizing the functions of the judicial office as representative ones is factually false—public opinion being irrelevant to the judge's role, and the judge's task being, as often as not, to disregard or even to defy that opinion, rather than to represent or carry it out." Thus, because of this non-representative function, the court concluded that the 1982 amendments to the Act do not extend to the judicial branch.

272. 831 F.2d 246 (11th Cir. 1987).

273. 850 F.2d 1430 (11th Cir. 1988) (en banc).

274. 683 F. Supp. 1537 (W.D. Tenn. 1988).

275. *See Dillard*, 831 F.2d at 252-53:

> We have reconsidered the anticipated role of the new chairperson. Although the extent of the chairperson's legislative power is said by Calhoun County to be minimal, we are not satisfied that the chairperson will be sufficiently uninfluential in the activities initiated and in the decisions made by the commission proper to be evaluated as a single-member office.

276. *See, e.g., Buchanan*, 683 F. Supp. at 1541-42; *Dallas County Comm'n*, 850 F.2d at 1432; *Dillard*, 831 F.2d at 251-52.

277. *Dillard*, 831 F.2d at 250-51.

278. *Accord* Thornburg v. Gingles, 478 U.S. 30, 47-48 (1986) (holding that the threshold inquiry of whether an at-large system violates section 2 of the Act is the existence of racial bloc voting that prevents the minority group from electing its preferred candidates).

279. 902 F.2d at 303-08.

280. *Cf.* Southern Christian Leadership Conf. v. Siegelman, 714 F. Supp. 511, 520 (M.D. Ala. 1989) (rejecting any notion that the applicability of section 2 should be based on functions of a particular position).

ysis with an examination of the function of the trial judge: "each acts alone in wielding judicial power, and once cases are assigned there is no overlap in decision-making."[281] Although it acknowledged that individual trial judges serve overlapping jurisdictions (*i.e.*, litigants can come from anywhere inside the jurisdiction of the court), the panel stated that no such overlap exists once a case has been assigned.[282] Furthermore, the panel dismissed the biannual meetings where Texas trial judges elect local administrative judges as perfunctory administrative duties.[283] Rather, the panel held that the distinguishing feature of the single officeholder is that the power of the office is exercised exclusively by one individual.[284] In this manner, the panel implicitly distinguished trial judges from the collegial appellate judiciary, which decides on cases as a group. Trial judges try and decide their own docket of cases and other judges have no influence over their decisions.[285] Based solely on this distinction, the panel concluded that the creation of single-member districts to ensure proportional representation for trial judges would be "superficial."[286]

The panel ruling in *LULAC I* further strayed from the traditional section 2 focus on the rights of the minority voter.[287] It characterized plaintiffs' proposal to establish single-member districts for trial judges as an ineffective method to ensure that minority litigants received equitable consideration from minority judges. In other words, the panel ruling approached the section 2 violation from the perspective of the minority litigant, *i.e.*, whether cases and issues involving minority litigants might be heard by minority judges.[288] According to the panel, single-member judicial districts were not the solution to the inequities of at-large judicial districts because cases involving minority litigants would probably not be assigned to judges elected from single-member minority districts. Thus, under single-member judicial districts, minority litigants would confront: 1) an "84.75%" probability that their cases would be tried before judges who were not politically accountable to any judicial district within the minority community; and 2) a "98.3%" likelihood that minority litigants would have their case heard by a judge who was not elected by the single-member judicial district of any particular minority litigant.[289] In other

281. *LULAC I*, 902 F.2d at 306.
282. *Id.* at 306.
283. *Id.* at 305.
284. *Id.* at 306.
285. *Id.* at 307.
286. *Id.* at 308.
287. *See* Thornburg v. Gingles, where the Court placed its greatest emphasis on the rights of the minority voter in a section 2 claim. 478 U.S. 30, 48 (1986).
288. *LULAC I*, 902 F.2d at 307.
289. *Id.* at 308.

words, even though minority voters might not successfully elect their preferred candidates in an at-large system, at least every judge within that at-large district would have some political accountability to minority voters within the at-large district.

These two foci of the panel ruling, first on the function of the trial judge, and next on the rights of minority litigants, were sharp departures from previous court rulings that focused their inquiry regarding Voting Rights Act violations on the rights of the minority *voter*.[290] For example, in *Chisom v. Edwards*, the Fifth Circuit cited *Dillard*, holding that as long as the "post is open to the electorate . . . it must be open in a way that allows racial groups to participate equally."[291] In *Southern Christian Leadership Conference v. Siegelman*, an Alabama district court also expressed the view that it is irrelevant to the issue of vote dilution whether trial judges "exercise the full authority of their offices alone."[292]

The dissent in *LULAC I* looked upon the single office-holder exception as merely a practical bar to the correction of minority vote dilution. Under this practical view, the exception is applicable only when an indivisible elective office is held by just one individual in a particular geographic area.[293] Rather than examining whether the office-holder wields his authority alone, the "practical" approach limits the exception to only those circumstances, as in *Butts*, where it is technically impossible to divide the electorate's share of an office in a given geographic voting area.[294] As the dissent argued in *LULAC II*,

> *Butts* stands for nothing more than the unremarkable proposition that

290. *See Gingles*, 478 U.S. at 47 ("The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white *voters* to elect their preferred representatives.") (emphasis added).

291. Chisom v. Edwards, 839 F.2d 1056, 1060 (5th Cir. 1988) (citing *Dillard*, 831 F.2d at 251).

292. 714 F. Supp. at 518 n.19.

293. The two clearest expressions of this view occurred in *Dillard* and *Southern Christian Leadership Conf.* In *Dillard*, the court held simply that the function of the county chairperson's office was irrelevant to whether the single office-holder exception was applicable. *See supra* note 277. *Southern Christian Leadership Conf.* specifically held that the single office-holder exception is only applicable to positions such as mayor or governor "where under no circumstances will there ever be more than one such position in a particular geographic voting area." 714 F. Supp. at 518 (footnote omitted).

See also *Westwego Citizens for Better Gov't v. Westwego*, where the Fifth Circuit held that it made no difference whether the aldermen elected at-large in Westwego also performed administrative duties. Furthermore, consideration of the administrative functions of an elected official would allow government bodies to "frustrate Congress' aim of eliminating barriers to the political participation of minorities on grounds wholly irrelevant to the determination required by Section 2—namely, whether the electoral system at issue in fact denies minorities equal opportunities to participate in the political process and to elect candidates of their choice." 872 F.2d 1201, 1211 (5th Cir. 1989).

294. *See Southern Christian Leadership Conf.*, 714 F. Supp. at 518. See also *LULAC II*: "The *Butts* exception is premised simply on the number of officials being elected (one), the unique respon-

> in certain electoral situations, there exists only one relevant office for the whole electorate. . . . *Butts* thus focuses on the *electorate* and whether the *electorate* can be subdivided; it does *not* focus on the official and whether the official or his office can be subdivided.[295]

The dissent's practical view contended that nothing in *Butts* premised the single office-holder exception on whether the elected official was part of a collegial body, but rather on the number of officials elected to the office and the practical impossibility of subdividing that single office.[296] Under this logic, the exemption from section 2 claims for the posts of mayor, governor, or probate judge are not granted because such officials govern in solitude, but because it is practically impossible to subdivide their offices and elect a share of them. If, for example, two co-chairpersons who shared executive duties were elected from a particular jurisdiction, the practical approach would contend that their elections could result in minority vote dilution remediable by the creation of two single-member districts. Conversely, when one specialty judge (*e.g.*, a probate or family judge) is elected from a district, such a post cannot be subject to a section 2 claim, because the electorate cannot be further subdivided, *i.e.*, it is impossible to elect less than one official. However, because trial judges (with the exception of the specialty courts) are essentially fungible and interchangeable, the only limit on the capacity to subdivide the electorate to ensure that the selection process is open to full minority participation is the number of elected officials.[297] In short, the practical view would apply *Butts* only where an electoral scheme is discriminatory but incorrigible because only one position is being filled for the entire geographical area.

The practical view further contends that not every single- member office is impossible to subdivide.[298] The mere existence of a single-member office should not foreclose vote dilution claims.[299] For example, in

sibilities of that office, and the impediment to subdividing that single position so that minority voters have the opportunity to elect a 'share.' ". 914 F.2d at 662 (Johnson, J., dissenting).

295. 914 F.2d at 661 (Johnson, J., dissenting) (emphasis in original).

296. 902 F.2d at 312 (Johnson, J., dissenting).

297. *See id.* at 315.

298. *LULAC II*, 914 F.2d at 660 n.18 (Johnson, J., dissenting).

299. *See* Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1 (1991). The commentator indicated that the *Butts* exception contradicts section 2 for two reasons. First, single-member offices can often be "recast" to afford opportunities for minority political representation and eliminate dilution of the minority vote. *Id.* at 4. Second, election procedures such as primary run-off requirements can result in minority vote dilution, *i.e.*, "winner take-all majoritarianism," whether the election is for a single office-holder or a multi-member office-holder. *Id.*

The commentator's first reason why *Butts* is inconsistent with section 2—because even some single-member offices can be subdivided—is strongly supported by Carrolton Branch of NAACP v. Stallings, 829 F.2d 1547 (11th Cir. 1987), *cert. denied sub nom.* Duncan v. Carrolton, 485 U.S. 936

Carrolton Branch of NAACP v. Stallings, the Eleventh Circuit recently sustained a challenge to a *one-person* county commission government.[300] The plaintiffs contended that the single commissioner system prevented them from electing a minority candidate and proposed an increase in the number of commissioners.[301] The court ruled that plaintiffs stated an actionable claim of minority vote dilution under the Carrolton single-commissioner system.[302] Although the court made no specific reference to *Butts*, the failure to apply the single office-holder exception under such a scenario further circumscribes the relevance of the *Butts* rule.[303]

Moreover, a test for the single office-holder exception that is based on whether the elected official exercises his authority alone rests on a tautology. As the *LULAC II* dissent argued, all officials, including those that are part of a larger collegial body, ultimately exercise full responsibility and authority over the duties of their offices.[304] Under such a definition, then, all office-holders are single office-holders. The dissent noted that appellate judges and legislators cast their votes as individuals and are no less responsible for the exercise of their duties than are sheriffs, mayors, or trial judges.[305]

Finally, the *LULAC I* dissent pointed to contradictions in the panel's application of its own rule to the Texas judicial system.[306] Trial judges, in fact, do exercise important duties as part of a collegial body. Texas trial judges, as a collegial body, together performed many important duties that were not merely "administrative."[307] As a county group, they shared the duties of jury selection, case assignment, and record retention. In addition, they also collectively elected the local administra-

(1988) (*see infra* notes 300-303 and accompanying text). The commentator's second argument against the single-office holder exception—regarding the notion of "winner take-all majoritarianism"—not only questions *Butts*, but raises fundamental questions about the *Gingles* threshold criteria. Specifically, it is a challenge to the *Gingles* requirement that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." Thornburgh v. Gingles, 478 U.S. 30, 50 (1986). Several commentators have suggested that the "majority" requirement unfairly forecloses any opportunity for vote dilution claims regarding minority *influence* (*i.e.*, as opposed to outright election of minority candidates) over the outcome of elections. *See supra* note 70 for further discussion of the limits imposed by the *Gingles* criteria. *See also* McDonald, *supra* note 17, at 1270 n.121, 1283. *See generally* Abrams, *supra* note 70.

300. 829 F.2d 1547, 1563 (11th Cir. 1987).

301. *Id.* at 1559-60.

302. *Id.* at 1563.

303. In fact, the dissent in *LULAC II* contended that the Eleventh Circuit "implicitly rejected" *Butts* in *Carrolton Branch of NAACP*. *LULAC II*, 914 F.2d at 660 n.18 (Johnson, J., dissenting).

304. *LULAC II*, 914 F.2d at 661 (Johnson, J., dissenting).

305. *Id.*

306. *LULAC I*, 902 F.2d, 293, 311-12 (5th Cir. 1990) (Johnson, J., dissenting).

307. See *id.* at 305, 307-08, where the panel claimed that such duties did not actually involve judicial functions, but were merely perfunctory administrative matters.

tive judge, appointed staff, established local rules, appointed the city auditor, and supervised the court clerk.[308] Moreover, all judges shared the responsibility of resolving cases through their overlapping jurisdiction, including the possibility of transferring cases among judges, or letting a different judge work on parts of a case including preliminary matters.[309]

The application of the single office-holder exception to judicial elections can have staggering implications for voting rights litigants. Over ninety percent of all elected trial judges will be exempt from section 2 if the Supreme Court affirms the panel ruling in *LULAC I*. The panel ruling was an unusually expansive interpretation of what was originally an uncomplicated proposition articulated in *Butts*. Originally, the Second Circuit in *Butts* simply proposed that minority voters had no section 2 claim for minority vote dilution when they elected just one indivisible official from a particular geographical area, like mayors or governors or presidents. It would be quite a leap of legal logic for the Supreme Court to extend *Butts* to state trial judges simply because such judges decide their cases as individuals.

IV. CONCLUSION

Racial discrimination in judicial elections violates section 2 of the Act. The alternative view, upheld in *LULAC II*, contravenes the basic principles of voting rights doctrine. Methodologically, *LULAC II* diverted the judicial inquiry under a voting rights claim away from the three proper foci: 1) the rights of the minority voter; 2) the challenged procedure's exclusion of minority voters from the political process; and 3) the broader pattern of racial discrimination that enables facially neutral procedures to prevent minority voters from electing their preferred candidates. The determination by the Fifth Circuit that judicial elections are exempt from section 2 misconstrued voting rights doctrine by exclusively focusing on the function of the judiciary. In short, the question that must be asked is not "who" or "what" is on the ballot, but rather "how" an election is conducted.

Ultimately, the Supreme Court's decision on the applicability of section 2 to state judicial elections will probably rest on the Court's statutory interpretation of the 1982 amendments to the Voting Rights Act. If the Court concludes that the legislative intent of Congress was to extend the "results test" for minority vote dilution claims to *all* elective posts,

308. *Id.* at 311-12 (Johnson, J., dissenting).
309. *Id.*

then the Court will find that judges are indeed "representatives." Conversely, if the Court does not find congressional intent to extend the provisions of the amended Act to the judiciary, then judges will assuredly not be defined as "representatives" covered under section 2. One simple way out of this interpretive debate is for Congress to simply resolve the issue by amending the Act to clarify its intentions.[310] Unfortunately, that is not likely to happen prior to the Court's decision. However, it is also a reasonable presumption that Congress never specifically foresaw that judicial districts might become the subject of voting rights claims under the Act. If that were the case, the only logical approach is to examine the general focus and methodology of voting rights doctrine as applied under the general spirit of the Act and the 1982 amendments.

LULAC II ignored existing voting rights doctrine and distilled racial discrimination in judicial elections down to a single threshold issue: the meaning of the term "representative." But, even on such terms, section 2 of the Act does extend to the judiciary. The Act, and the Senate Report that accompanied it, reflected congressional intent to comprehensively uproot all vestiges of racial discrimination in voting.[311] Judicial creation of broad exceptions to the Act on the basis of hairsplitting semantic distinctions counters the historic purpose and intent of the Act. Furthermore, the contention that *Wells* precludes extension of the Act to judicial elections is premised on a faulty analogy between the one-person one-vote principle and the doctrine of minority vote dilution.

Nonetheless, even if the word "representative" is examined in its literal sense, judges are representatives. As government officials, they are selected by the public (or by some representative process) to advance the interests of society and protect the rights of individual litigants who appear before them. The view that judges are not representatives because they merely apply and interpret existing rules of law conflicts with both the reality and theory of modern jurisprudence. Citizens want accountable judges who reflect their legitimate concerns. Judicial independence and impartiality is not compromised, but enhanced, by the recognition that judges serve all citizens. Judicial decisions and rules of law acquire legitimacy and authority only to the extent that they represent the public will.

Finally, the concurring judges' effort to seek a seeming middle ground based on the application of the single office-holder exception to

310. Voting rights litigants and activists used this approach after *Bolden* when the Court adopted an intent requirement for violations of the Act. The subsequent 1982 amendments essentially nullified *Bolden*.

311. *See* South Carolina v. Katzenbach, 383 U.S. 301, 311-15 (1966).

trial judges rests upon the same logic and is nearly as damaging as the erroneous contention that state judges are not covered by section 2.

Given the Supreme Court's affirmance of *Brooks*—holding that section 5 of the Act does apply to state judges—the Court should not uphold *LULAC II*. As the attorney for the plaintiffs in *LULAC II* recently stated, if the Court does uphold *LULAC II*, the anomalous state of "the law will be that discrimination in voting will not be tolerated, except in the election of judges."[312]

312. Greenhouse, *supra* note 15, at 17, col. 1.